FILED
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No. 99-312

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 20, 1999
CERTIORARI GRANTED OCTOBER 18, 1999

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A.	Opinion of the United States Court of Appeals for the Sixth Circuit (filed April 13, 1999)	1a
B.	Opinion of the United States District Court for the Western District of Tennessee (filed April 17, 1996)	26a
C.	Order Denying Petition for Rehearing *en banc* in the United States Court of Appeals for the Sixth Circuit (filed May 24, 1999)	38a

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
(JACKSON)

Civil Case No. 94-CV-1212

DEDRA SHANKLIN,
Plaintiff,

v.

NORFORK SOUTHERN RAILWAY COMPANY, *et al.*,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
9/26/94	1	COMPLAINT (waiver of service of summons) Receipt #: 157445; Filing fee $120.00 - CJT (bph) [Entry date 09/26/94]
9/26/94	2	MOTION for attorney Pamela R. O'Dwyer to appear pro hac vice CJT w/p/o (bph) [Entry date 09/26/94]
10/3/94	3	ORDER by Judge James D. Todd granting motion for attorney Pamela R. O'Dwyer to appear pro hac vice [2-1] - CJT (cc: all counsel) (pb) [Entry date 10/03/94]
10/17/94	4	ANSWER by defendant Norfolk So. Railway to [1-1] (filed Mphs; recd Jackson 10/19/94) - CJT (pb) [Entry date 10/19/94]
10/27/94	5	MOTION by dfts Cincinnati, New Orleans & Texas Pacific Ry. Co. & Norfolk So. Corp. for summary judgment - CJT (pb) [Entry date 10/27/94]

DATE	NO.	PROCEEDINGS
10/27/94	6	NOTICE by Cincinnati, New Orleans & Texas Pacific Ry. Co. & Norfolk So. Corp. of intent to file affidavit w/attmt - CJT (pb) [Entry date 10/27/94]
12/21/94	7	OBJECTIONS by defendant Norfolk So. Railway to plt's first request for production of docmts - CJT (pb) [Entry date 12/21/94]
1/12/95	8	MOTION by dfts Norfolk So. Railway, Ry. Co. & Norfolk So. Corp. to extend time to respond to disc - CJT (pb) [Entry date 01/12/95]
1/18/95	9	ORDER by Judge James D. Todd granting motion to extend time to respond to disc [8-1]. Dfts allowed until 2/28/95 to respond - CJT (cc: all counsel) (pb) [Entry date 01/18/95]
2/2/95	10	SETTING LETTER - Scheduling Conference set for Thursday, 03/23/95 at 3:30 p.m. before MagJBreen (bph) [Entry date 02/02/95]
3/21/95	11	NOTICE (Disclosure statement) by Defendant Norfolk So. Railway - CJT (pb) [Entry date 03/21/95]
3/22/95	12	NOTICE (initial disclosures) by plaintiff - CJT w/attmts (pb) [Entry date 03/22/95]
3/24/95	13	SCHEDULING ORDER 16(b) Mag Judge J. D. Breen; motion filing deadline set for 1/16/96.; discovery deadline set for 12/15/95.; proposed pretrial order to be entered on 4/8/96.; pretrial conference set for 4/18/96.; jury trial set for 4/29/96.; deadline for joining parties set for 10/2/95.; deadline for amending pleadings set for 10/2/95. (cc: all counsel) (gn) [Entry date 03/27/95]

DATE	NO.	PROCEEDINGS
3/28/95	14	ORDER SETTING CASE FOR TRIAL by Judge James D. Todd jury trial 9:30, 04/29/96, pretrial conference 9:00, 04/18/96, pretrial order due by 04/08/96 (cc: all counsel) CJT, Ct Rm Deputy, Ct Reporter, Jury Deputy (bph) [Entry date 03/28/95]
3/28/95	16	CONSENT PROTECTIVE ORDER approved by Judge D. Todd - all personnel and medical records of dfts to be produced for use at trial under special confidentiality agreement - CJT, counsel of record all counsel) (mvv) [Entry date 03/29/95]
3/29/95	15	CONSENT ORDER by Judge James D. Todd: dismissing party Norfolk So. Corp., party Ry. Co. - CJT (cc: all counsel) (mvv) [Entry date 03/29/95]
6/23/95	17	SUPPLEMENT by plaintiff re notice (initial disclosures) [12-1] - CJT (pb) [Entry date 06/25/95]
9/13/95	18	SECOND SUPPLEMENT to initial disclosures by plaintiff - CJT (pb) [Entry date 09/13/95]
9/28/95	19	THIRD SUPPLEMENT to initial disclosures by plaintiff - CJT (pb) [Entry date 09/29/95]
10/2/95	20	SUPPLEMENT to designation of expert witnesses by defendant Norfolk So. Railway (filed Mphs; recd Jksn 10/5/95) - CJT (pb) [Entry date 10/05/95] [Edit date 10/05/95]
10/2/95	21	NOTICE (Designation of expert witnesses) by defendant Norfolk So. Railway/filed Mphs; recd Jksn 10/5/95/ - CJT (pb) [Entry date 10/05/95]

DATE	NO.	PROCEEDINGS
10/23/95	22	NOTICE (Disclosure of rebuttal expert witness) by plaintiff - CJT (pb) [Entry date 10/23/95]
10/27/95	23	MOTION by defendant Norfolk So. Railway for leave to designate a rebuttal expert witness - CJT wpo (pb) [Entry date 10/30/95]
10/27/95	24	MEMORANDUM by defendant Norfolk So. Railway in support of motion for leave to designate a rebuttal expert witness [23-1] - CJT (pb) [Entry date 10/30/95]
10/27/95	25	ATTORNEY'S CERTIFICATE by counsel for defendant Norfolk So. Railway - CJT (pb) [Entry date 10/30/95]
10/30/95	26	SECOND SUPPLEMENT to designation of expert witnesses by defendant Norfolk So. Railway (pb) [Entry date 10/30/95]
11/6/95	27	FOURTH SUPPLEMENT by plaintiff to initial disclosures - CJT (pb) [Entry date 11/06/95]
11/8/95	28	NOTICE (third supplement to designation of expert witnesses) by defendant Norfolk So. Railway w/attd Exh. A: vitae of Joseph Sobel and Edward Adams - CJT (pb) [Entry date 11/08/95]
11/17/95	29	ORDER by Judge James D. Todd granting motion for leave to designate a rebuttal expert witness [23-1] - CJT (cc: all counsel) (pb) [Entry date 11/20/95]
11/20/95	30	SUPPLEMENTAL Disclosure statement by defendant Norfolk So. Railway - CJT (pb) [Entry date 11/20/95]
12/1/95	31	SUPPLEMENT by plaintiff to disclosure of rebuttal expert witness - CJT (pb) [Entry date 12/04/95]

DATE	NO.	PROCEEDINGS
12/11/95	32	FIFTH SUPPLEMENT to initial disclosures by plaintiff - CJT, CJBre (pb) [Entry date 12/12/95]
12/14/95	33	MOTION by defendant Norfolk So. Railway to modify sched order - CJT wpo (pb) [Entry date 12/15/95]
12/14/95	34	MEMORANDUM by defendant Norfolk So. Railway in support of motion to modify sched order [33-1] - CJT (pb) [Entry date 12/15/95]
12/14/95	35	CERTIFICATE OF COUNSEL by defendant Norfolk So. Railway - CJT (pb) [Entry date 12/15/95]
12/15/95	36	ORDER by Judge James D. Todd granting motion to modify sched order [33-1] motion filing ddl reset for 2/16/96; depositions ddl reset for 2/9/96 - CJT (cc: all counsel) (pb) [Entry date 12/18/95]
2/13/96	37	MOTION by defendant Norfolk So. Railway for order extending the time to concluded depo of Gary P. Wolf - CJT (pb) [Entry date 02/15/96] [Edit date 02/15/96]
2/14/96	38	CONSENT ORDER EXPENDING TIME TO CONCLUDE DEPOSITION OF GARY P. WOLF by Judge James D. Todd: Plt may take the disc depo of dft's expert, Gary P. Wolf, after 2/16/96, at a time to be agreed to between the parties - CJT (cc: all counsel) (pb) [Entry date 02/14/96] [Edit date 02/15/96]
2/16/96	39	MOTION by plaintiff for summary judgment - CJT (pb) [Entry date 02/20/96]

DATE	NO.	PROCEEDINGS
2/16/96	40	MEMORANDUM by plaintiff in support of motion for summary judgment [39-1] w/ attd Exhs: 1. excerpt fr depo of Nelson E. Christianson; 2. afdt of T.H. Sellers; 3. afdt of Archie Burnham; 4. excerpt fr depo of William Cantrell - CJT (pb) [Entry date 02/20/96]
2/16/96	41	MOTION by defendant Norfolk So. Railway for summary judgment (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	42	MEMORANDUM by defendant Norfolk So. Railway in support of motion for summary judgment [41-1] (filed Mphs; recd Jksn 2/21/96)- CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	43	APPENDIX filed by defendant Norfolk So. Railway re motion for sum jgm [41-1] incl copies from legal publications and opinions fr Iowa and Texas courts (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	44	AFFIDAVIT of Edmund B. Edwards (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	45	NOTICE OF INTENT TO FILE AFFIDAVITS OF GARY P. WOLF AND CHARLES D. WICKWIRE by defendant Norfolk So. Railway w/attd Exhs: A-B. proposed docmts (filed Mphs; recd Jksn. 2/21/96) - CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	46	MOTION by defendant Norfolk So. Railway to limit venire w/attd Exhs: A-C. newspaper articles (filed Mphs; recd Jkson 2/21/96) - CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]

DATE	NO.	PROCEEDINGS
2/16/96	47	MEMORANDUM by defendant Norfolk So. Railway in support of motion to limit venire [46-1] (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/95] [Edit date 02/21/96]
2/16/96	48	MOTION by defendant Norfolk So. Railway in limine re photographs, cmplts about crossing, etc. (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	49	MEMORANDUM by defendant Norfolk So. Railway in support of motion in limine re photographs, cmplts about crossing, etc. [48-1] w/attd Exhs: 1-2. photographs (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	50	NOTICE OF FILING OF DEPOSITIONS by defendant Norfolk So. Railway (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	51	DEPOSITION (1 cpy) of Nelson E. Christianson, III taken on the following date(s): October 12, 1995 (filed Mphs; recd Jksn 2/21/96) (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	52	DEPOSITION (1 cpy) of William Terry Cantrell taken on the following date(s): May 3, 1995 (filed Mphs; recd Jksn 2/21/96) (pb) [Entry date 02/21/96]
2/16/96	53	DEPOSITION (1 cpy) of Christopher McAnally taken on the following date(s) May 1, 1995 (filed Mphs; recd Jksn 2/21/96) (pb) [Entry date 02/21/96]
2/23/96	54	ORDER EXTENDING TIME TO CONCLUDE DEPOSITION OF GARY P. WOLF by Judge James D. Todd. Dft allowed to 2/29/96 to conclude deposition - CJT (cc: all counsel) (pb) [Entry date 02/25/96]

DATE	NO.	PROCEEDINGS
2/29/96	55	AFFIDAVIT of Charles D. Wickwire re motion for sum jgm [41-1] w/attmts: photographs - CJT (pb) [Entry date 03/02/96]
2/29/96	56	AFFIDAVIT of Gary P. Wolf re motion for sum jgm [41-1] w/attd accident report - CJT (pb) [Entry date 03/02/96]
3/7/96	57	RESPONSE by plaintiff to motion to limit venire [46-1] - CJT (pb) [Entry date 03/07/96]
3/7/96	58	RESPONSE by plaintiff to motion in limine re photographs, cmplts about crossing, etc. [48-1] w/attd Exh: 1. opinion from COA Sixth Circuit (Bryan -v- Emerson Elec) - CJT (pb) [Entry date 03/07/96]
3/7/96	59	RESPONSE (MEMORANDUM IN OPPOSITION) by plaintiff Dedra Shanklin to motion for summary judgment [41-1] w/attd Exhs: A. COA writs of certiorari; B. MS State COA brief; C. afdt of Archie Burnham; D. excerpt fr depo of A. Burnham; E. excerpt fr depo of Wm. Cantrell; F. afdt of T.H. Sellers; G. excerpt fr depo of Nelson Christianson; H. order USDC WD/TN (Mphs); I. minutes of Grade Crossing Safety Steering Committee mtg; J. excerpt fr depo of Steven Driskell - CJT (pb) [Entry date 03/07/96]
3/7/96	60	MOTION by plaintiff to exceed page limitation - CJT wpo (pb) [Entry date 03/08/96]
3/7/96	61	NOTICE OF ATTORNEY'S LIEN by Bill R. Barron - CJT (pb) [Entry date 03/08/96]
3/12/96	62	ORDER by Judge James D. Todd granting motion to exceed page limitation [60-1] - CJT (cc: all counsel) (pb) [Entry date 03/13/96]

DATE	NO.	PROCEEDINGS
3/18/96	63	REPLY (MEMORANDUM) by defendant Norfolk So. Railway to response to motion in limine re photographs, cmplts about crossing, etc. [48-1] [filed Mphs) - CJT (pb) [Entry date 03/21/96] [Edit date 03/21/96]
3/18/96	64	(MEMORANDUM IN) RESPONSE by defendant Norfolk So. Railway to motion for summary judgment [39-1] (filed Mphs) w/attmt: excerpt from videotape depo of Tom Rose - CJT (pb) [Entry date 03/21/96]
3/18/96	65	REPLY (MEMORANDUM) by defendant Norfolk So. Railway to response to motion to limit venire [46-1] (filed Mphs) - CJT (pb) [Entry date 03/21/96]
3/18/96	66	REPLY by defendant Norfolk So. Railway to plt's memorandum in opposition to dft's motion for sum jgm (filed Mphs) - CJT (pb) [Entry date 03/21/96]
3/18/96	67	NOTICE OF FILING OF DEPOSITION by defendant Norfolk So. Railway - CJT (pb) [Entry date 03/21/96]
3/18/96	68	DEPOSITION (copy only) of Archie C. Burnham taken on the following date(s): August 30, 1995 at 9:00am (pb) [Entry date 03/21/96]
3/20/96	69	ORDER OF REFERENCE by Judge James D. Todd that this action be referred to Mag J. Daniel Breen for conducting a stlmt conf - CJBre (cc: all counsel) (pb) [Entry date 03/21/96]
3/21/96	70	SUPPLEMENT by plaintiff re motion response [58-1] to dft's motion in limine w/attd Exh: A. excerpt fr depo of Archie C. Burnham - CJT (pb) [Entry date 03/21/96]
3/21/96	71	MOTION by plaintiff for pretrial conference - CJT (pb) [Entry date 03/21/96]

DATE	NO.	PROCEEDINGS
3/21/96	72	MEMORANDUM (BRIEF) by plaintiff in support of motion for pretrial conference [71-1] - CJT (pb) [Entry date 03/21/96]
3/21/96	73	SETTING LETTER settlement conference set for 9:30 4/3/96 before Judge Breen - MEMPHIS (skp) [Entry date 03/21/96]
3/27/96	74	ORDER by Judge D. Todd denying motion to limit venire [46-1] - CJT (cc: all counsel) (pb) [Entry date 03/28/96]
3/29/96	75	SUPPLEMENTAL MEMORANDUM by defendant Norfolk So. Railway re motion for summary judgment [41-1] w/attmts Exhs: A. aft of Mike Selig; B. afdt of Newton McCormick, Jr.; C. order from USDC/WD-TN (Mphs)- CJT (pb) [Entry date 03/30/96]
3/29/96	75	RESPONSE by defendant Norfolk So. Railway to motion for summary judgment [39-1] w/attd Exhs: A. afdt of Mike Selig; B. afdt of Newton McCormick, Jr.; C. order from USDC/WD-TN (Mphs) - CJT (pb) [Entry date 03/30/96]
3/29/96	76	STATEMENT of undisputed material facts by defendant Norfolk So. Railway w/attmt Exh: A. excerpt from depo of Dedra Shanklin (pb) [Entry date 03/30/96]
4/1/96	77	RESPONSE by plaintiff to dft's reply to plt's memorandum in opposition to dft's motion for sum jgm w/Exhs: 1. appeal brief; 2. excerpt from depo of Bernard Abrams; 3. photo (cpy); 4. Fed RR Admin report; 5. excerpt from depo of William E. Martin; 6. except from depo of Jack H. Landers, Jr.; 7. photos (cpy); 8. excerpt from depo of Christopher McAnally - CJT (pb) [Entry date 04/01/96]

DATE	NO.	PROCEEDINGS
4/1/96	78	REPLY by plaintiff to response to motion for summary judgment [39-1] w/attd Exhs: A. supplemental afdt of Archie Burnham and excerpt from the RR-Hwy Grade Crossing Handbook; B. excerpt from depo of Steven B. Driskell - CJT (pb) [Entry date 04/01/96]
4/1/96	79	RESPONSE by plaintiff to dft's reply memorandum in support of dft's motion to limit venire w/attd letter printed in the Commercial Appeal - CJT (pb) [Entry date 04/01/96]
4/4/96	80	ORDER by Judge James D. Todd partially granting and partially denying motion in limine re photographs, cmplts about crossing, etc. [48-1] - CJT (cc: all counsel) (pb) [Entry date 04/05/96]
4/4/96	81	MINUTES: Settlement conference: settlement conf ddl satisfied; case not settled, and terminating case referral (pb) [Entry date 04/05/96]
4/8/96	82	SUPPLEMENT by plaintiff to memorandum in opposition to dft's motion for sum jgm w/attd opinion from USDC SD/MS - CJT (pb) [Entry date 04/10/96]
4/11/96	83	JOINT PRE-TRIAL ORDER approved by Judge James D. Todd: - CJT (cc: all counsel) (pb) [Entry date 04/12/96]
4/17/96	84	ORDER by Judge James D. Todd partially granting and partially denying motion for summary juudgment [41-1]—GRANTED as to plt's excessive speed and "ditch light" claims—DENIED as to plt's inadequate horn and braking, vegetation, and inadequate warning devices claims; denying motion for summary juudgment [39-1] - CJT, OB (cc: all counsel) (pb) [Entry date 04/18/96]

DATE	NO.	PROCEEDINGS
4/25/96	85	MOTION by miscellaneous parties Nelson Christianson III, Terry Cantrell to quash subpoenas, and for expedited hearing w/ attd Exhs: A-B. cpys of subpoenas; C-E. afdts of Nelson Christianson III, Alvin Pearson and Mary Moody - CJT (pb) [Entry date 04/26/96] [Edit date 04/30/96]
4/26/96	86	PRE-TRIAL BRIEF FILED by defendant Norfolk So. Railway - CJT (pb) [Entry date 04/26/96]
4/26/96	87	OBJECTIONS by defendant Norfolk So. Railway to plt's exhibits - CJT (pb) [Entry date 04/26/96]
4/29/96	88	RESPONSE (MEMORANDUM IN OPPOSITION) by defendant Norfolk So. Railway to motion to quash subpoenas [85-1], to motion for expedited hearing [85-2] - CJT (pb) [Entry date 04/29/96]
4/29/96	89	AFFIDAVIT of atty Everett B. Gibson re motion response [88-1] - CJT (pb) [Entry date 04/29/96]
4/29/96	90	MINUTES: 9:50 - 10:10 Hearing - Arguments heard; motion to quash subpoenas [85-1] denied, re [85-2] (pb) [Entry date 04/30/96]
4/29/96	91	MINUTES: 10:10 - 5:15 Jury trial began, and; Jury trial ddl satisfied 4/29/96. Adj til 9:30am 5-1-96. (pb) [Entry date 04/30/96]
5/1/96	92	DEPOSITION (1 orig) of Bernard S. Abrams, O.D. taken on the following date(s): January 10, 1996 (pb) [Entry date 05/01/96]

DATE	NO.	PROCEEDINGS
5/1/96	93	MEMORANDUM by defendant Norfolk So. Railway in support of motion to exclude the testimony of Bernard S. Abrams, O.D. (Jksn clerk's office called Mphs clerk's office and Mr. Gibson re whether or not motion was filed) [Memorandum was filed in Mphs and recd in Jkson 5/2/96] - CJT (pb) [Entry date 05/06/96]
5/1/96	94	MINUTES: 9:30-4:55 Jury trial resumed. Stipulation that dft owns track and that it was a class 4 track. Testimony continues. 4:30pm Dfts proof. Adj. 4:55 til 9:00 am 5/2/96. (pb) [Entry date 05/06/96]
5/2/96	95	MINUTES: 9:15-11:50 Jury trial resumed. Adj. til 9:30am 5/6/96. (pb) [Entry date 05/06/96]
5/6/96	96	DEPOSITION of Steven Bruce Driskell taken on the following date(s): September 22, 1995 (pb) [Entry date 05/07/96]
5/6/97	97	MINUTES: 9:40-4:30 Jury trial resumed. Testimony continues: 1:55pm Dft rest; 2:00 Plt rest. Out of presence of jury; dfts' motion for jgmt as a matter of law—denied, except to punitive damage claim. Adj. 4:30pm til 9:30am 5/7/96. (pb) [Entry date 05/13/96]
5/7/96	98	MINUTES: 9:40 Jury trial continues. 11:25 —queston from jury; 2:15—question from jury. Verdict returned—3:00 in favor of plt. Jury trial ended. Adj. 3:10pm (pb) [Entry date 05/13/96] [Edit date 05/14/96]
5/7/96	—	REMARK - note from jury (pb) [Entry date 05/13/96]
5/7/96	—	REMARK - note from jury (pb) [Entry date 05/13/96]

DATE	NO.	PROCEEDINGS
5/7/96	99	VERDICT for plaintiff Dedra Shanklin against defendant Norfolk So. Railway. (pb) [Entry date 05/13/96] [Edit date 05/14/96]
5/7/96	102	EXHIBIT AND WITNESS list (pb) [Entry date 05/13/96]
5/7/96	103	JUDGMENT: by Judge James D. Todd terminating case. - CJT, OB (cc: all counsel) (pb) [Entry date 05/14/96]
5/8/96	100	REQUESTED JURY INSTRUCTIONS submitted by defendant Norfolk So. Railway (pb) [Entry date 05/13/96]
5/8/96	101	REQUESTED JURY INSTRUCTIONS submitted by plaintiff Dedra Shanklin (pb) [Entry date 05/13/96]
5/17/96	104	MOTION by defendant Norfolk So. Railway for leave to file supplmtl brief (filed Mphs; recd Jksn 5/21/96) - CJT wpo (pb) [Entry date 05/22/96]
5/17/96	105	MEMORANDUM by defendant Norfolk So. Railway in support of motion for leave to file supplmtl brief [104-1] (filed Mphs; recd Jksn 5/21/96) - CJT (pb) [Entry date 05/22/96]
5/17/96	106	CERTIFICATE by atty for defendant Norfolk So. Railway (filed Mphs) - CJT (pb) [Entry date 05/22/96]
5/17/96	107	MOTION by defendant Norfolk So. Railway for judgment notwithstanding verdict or, in the alternative, for a new trial (filed Mphs) - CJT (pb) [Entry date 05/22/96]
5/17/96	108	MEMORANDUM by defendant Norfolk So. Railway in support of motion for judgment notwithstanding verdict [107-1], of motion for a new trial [107-2] (filed Mphs) - CJT (pb) [Entry date 05/22/96]

DATE	NO.	PROCEEDINGS
5/29/96	109	ORDER by Judge James D. Todd granting motion for leave to file supplmtl brief [104-1] w/i five (5) das from receipt of the evidentiary transcript. Plt may have twenty (20) das to respond to the brief and supplmtl brief. Plt need not respond to the original brief until the supplmtl brief has been filed and may file a single response to both briefs - CJT (cc: all counsel) (pb) [Entry date 05/29/96]
5/30/96	110	RESPONSE by plaintiff to motion for judgment notwithstanding verdict [107-1], to motion for a new trial [107-2] - CJT wpo (pb) [Entry date 05/31/96]
5/30/96	111	RESPONSE by plaintiff to dft's motion for leave to file supplmtl brief [104-1] - CJT wpo (pb) [Entry date 05/31/96]
5/30/96	112	BILL OF COSTS submitted by plaintiff re [103-2] - CJT, cpy to Clerk (pb) [Entry date 05/31/96]
6/4/96	113	OBJECTIONS by defendant Norfolk So. Railway to bill of costs [112-1] - CJT (pb) [Entry date 06/06/96]
6/5/96	114	MOTION by plaintiff to require payment of expert fees - CJT (pb) [Entry date 06/06/96]
6/5/96	115	MEMORANDUM by plaintiff in support of motion to require payment of expert fees [114-1] w/attd Exhs: 1. afdt. of Pamela R. O'Dwyer; A-B. ltrs; 2. ltr; 3. afdt of Bernard S. Abrams: A. excerpt fr depo of Bernard S. Abrams, O.D., B. stmt re expert witness service fees - CJT (pb) [Entry date 06/06/96]

DATE	NO.	PROCEEDINGS
6/11/96	116	SETTING LETTER: taxation of cost by the Clerk set for 07/10/96 at 10:45 Rm 101 Fed Bldg Jackson (bph) [Entry date 06/12/96]
6/21/96	117	MOTION by defendant Norfolk So. Railway to extend time to respond to motion to require payment of expert fees - CJT (skp) [Entry date 06/25/96]
6/21/96	118	MEMORANDUM by defendant Norfolk So. Railway in support of motion to extend time to respond to motion to require payment of expert fees [117-1] - CJT (filed Mphs) (skp) [Entry date 06/25/96] [Edit date 06/25/96]
6/21/96	119	CERTIFICATE of counsel Ralph T. Gibson - CJT (skp) [Entry date 06/25/96]
6/25/96	120	ORDER by Judge James D. Todd granting motion to extend time to respond to motion to require payment of expert fees [117-1] - dfdt granted extension of 25 days (cc: all counsel) (ejs) [Entry date 06/26/96]
6/28/96	121	SETTING LETTER: Cost assessment hrg reset for 7/9/96 at 10:45 (skp) [Entry date 06/28/96]
7/8/96	122	RESPONSE to defendant's objections to plaintiff's bill of costs [113-1] CJT, cpy faxed Mr. Di Trolio (bph) [Entry date 07/08/96]
7/8/96	—	REMARK - Rcd TC from Ann of Atty Pamela O'Dwyer office - Ms. O'Dwyer will not be present for cost hearing on 7/9/96 (skp) [Entry date 07/08/96]
7/15/96	123	TRANSCRIPT (5 VOLS.) filed of trial proceedings on April 29, 1996 and May 1, 2, 6, 7, 1996 (Clerk's cpy) (pb) [Entry date 07/15/96]

DATE	NO.	PROCEEDINGS
7/15/96	124	TRANSCRIPT (1 VOL.) filed of plt's closing arguments on May 7, 1996 (Clerk's cpy) (pb) [Entry date 07/15/96]
7/18/96	125	TRANSCRIPT filed of Opening Statement on April 29, 1996 (Clerk's cpy) (pb) [Entry date 07/19/96]
7/22/96	126	SUPPLEMENTAL MEMORANDUM by defendant Norfolk So. Railway re motion for judgment notwithstanding verdict [107-1], re motion for a new trial [107-2] - CJT (pb) [Entry date 07/23/96]
7/23/96	127	ORDER TAXING COSTS by Robert R. Di Trolio, Clerk. Costs are taxed against Defendant and in favor of plt for the amt of $3,763.39 - CJT (cc: all counsel) (pb) [Entry date 07/24/96] [Edit date 07/24/96]
7/24/96	128	ORDER by Judge James D. Todd granting motion to require payment of expert fees [114-1] w/o prejudice to refiling - CJT (cc: all counsel) (pb) [Entry date 07/25/96]
7/29/96	129	NOTICE (APPEAL FROM ORDER TAXING COSTS) by defendant Norfolk So. Railway (filed Mphs) - CJT, Clerk (pb) [Entry date 07/31/96]
7/31/96	130	MOTION by plaintiff for review (of order taxing costs w/attd receipts - CJT, Clerk (pb) [Entry date 07/31/96]
8/8/96	131	CONSENT ORDER EXTENDING TIME by Judge James D. Todd:. Plt allowed up to and incl 8/26/96 to respond to dft's supplmtl memorandum - CJT (cc: all counsel) (pb) [Entry date 08/08/96]

DATE	NO.	PROCEEDINGS
8/26/96	132	RESPONSE (SUPPLEMENTAL MEMORANDUM IN OPPOSITION) by plaintiff to motion for judgment notwithstanding verdict [107-1], to motion for a new trial [107-2] w/attd App. 1: Supreme Ct decisions; 2. USDC ED/LA order and reasons - CJT (pb) [Entry date 08/28/96]
9/9/96	133	ORDER by Judge James D. Todd granting in part the motion for review (of order taxing costs [130-1] (Court approves clerk's taxation of $120.00 ff; $2,874.93 in deposition costs; $107.42 in exemplification and copy fees. Cost are also taxes in the amount of $400.00 for witness fees; $810.54 in witness travel expenses. Therefore, costs are taxed against dft and in favor of the pla in the total amount of $4,312.89) (cc: JT, info to clerk, all counsel) (gn) [Entry date 09/09/96]
9/13/96	134	ORDER by Judge James D. Todd denying motion for judgment notwithstanding verdict [107-1], denying motion for a new trial [107-2] - CJT (cc: all counsel) (pb) [Entry date 09/16/96]
9/25/96	135	NOTICE OF APPEAL by defendant Norfolk So. Railway from Dist. Court decision, jgmt [103-2]; order [134-1] - CJT (cc: all counsel) (pb) [Entry date 09/30/96]
9/25/96	—	RECEIVED re appeal [135-1] fee in amount of $105.00 (Receipt #17578) (pb) [Entry date 09/30/96]
10/10/96	—	REMARK - cpy ntc of appeal mailed COA w/2TForms, cert ds and cpy of #s 15, 84, 103, 134 (pb) [Entry date 10/10/96]

DATE	NO.	PROCEEDINGS
10/18/96	—	REMARK - cpy of Jury Verdict (docket entry #99) mailed COA w/2TForms and cert ds (pb) [Entry date 10/18/96]
10/23/96	—	NOTIFICATION by 6th Circuit Court Number 96-6371 (pb) [Entry date 10/24/96]
11/4/96	—	NOTIFICATION by 6th Circuit Court Number 96-6371 (pb) [Entry date 11/05/96]
9/10/97	—	ORIGINAL record on appeal transmitted to 6th Circuit consisting of 5 vol(s) pleadings: 7 vol(s) transcripts: 5 vol(s) deposition: w/cert copy of docket sheet and 2 transmission forms. (cc: copies to all counsel) [135-1] (pb) [Entry date 09/10/97] [Edit date 09/10/97]
4/19/99	136	JUDGMENT AND SLIP opinion from USCA filed 4/13/99 affirming the decision of the District Court [135-1] (pb) [Entry date 04/20/99]
4/26/99	137	BILL OF COSTS for appeal submitted by plaintiff/appellee Dedra Shanklin re judgment [103-2]. Amt. $821.20 for trial transcripts - CJT (pb) [Entry date 04/27/99]
7/7/99	—	ORIGINAL RECORD on appeal returned from 6th Circuit consisting of 5 pls; 7 tr; 5 depos (pb) [Entry date 07/07/99]
9/7/99	—	REMARK - ntc fr US Supreme Ct of filing of petition for writ of certiorari 8/20/99; dkt #99-312. (pb) [Entry date 09/08/99]
10/25/99	138	NOTICE OF FILING OF notification from US Supreme Court - petition for writ of certiorari is granted (ejc) [Entry date 10/26/99]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-6371

DEDRA SHANKLIN,
Plaintiff-Appellee,
v.

NORFOLK SOUTHERN RAILWAY COMPANY, *et al.*,
Defendants-Appellants.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/18/96	Civil Case Docketed. Notice filed by Appellant Norfolk Southern Railway Company. Transcript needed: y (mcp)
10/25/96	APPEARANCE filed by Attorney Pamela R. O'Dwyer for Appellee Dedra Shanklin [96-6371] (mcp)
11/4/96	APPEARANCE filed by Attorney Everett Gibson for Appellant Norfolk So Ry Co [96-6371] (mcp)
11/4/96	PRE-ARGUMENT STATEMENT filed by Everett Gibson for Appellant Norfolk So Ry Co [96-6371] (mcp)
11/4/96	TRANSCRIPT ORDER FORM filed by Everett Gibson for Appellant Norfolk So Ry Co: Transcript on file in district court. [96-6371] [1417893-1] (blh)

DATE	PROCEEDINGS
1/7/96	BRIEFING LETTER SENT setting briefing schedule: appellant "proof" brief due 12/17/96; appellee "proof" brief due 1/16/97; reply brief due 1/30/97; appendix due 2/6/97; appellant & appellee's "final" brief due 2/27/97; [96-6371]. (mcp)
11/19/96	Pre-Argument Conference work complete. (wjr)
12/19/96	PROOF BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 12/17/96 Number of Pages: 75. [96-6371] (mcp)
12/19/96	Request to require oral argument (page 1) filed by Everett Gibson for Appellant Norfolk So Ry Co [96-6371] (mcp)
12/27/96	BRIEFING LETTER SENT requesting Everett Gibson a Designation of Appendix Contents. And also informing counsel that when the "final" brief is filed, the references to the record be placed in parenthesis ( ). Designation due: 1/6/97 . (mcp)
1/15/97	Appellant MOTION filed with affidavit in support, to file appendix designation out-of-time. [1454247-1]. Motion filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 1/14/96 [96-6371] (mcp)
1/16/97	LETTER SENT by mcp granting motion to file appendix designation out-of-time [1454247-1] motion filed by Everett Gibson [96-6371] (mcp)
1/16/97	APPEARANCE filed by Attorney Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc [96-6371] (mcp)
1/16/97	Amicus MOTION filed to allow The Association of Trial Lawyers of America to file an amicus curiae brief in support of appellee. Motion filed by Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc. Certificate of service date 1/15/97. [96-6371] (mcp)

DATE	PROCEEDINGS
1/16/97	BRIEF TENDERED. Received from Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc [96-6371]. Certificate of service date 1/15/97. (mcp)
1/16/97	AMICUS BRIEF filed by Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc. Copies 7. Certificate of service date 1/15/97. Number of Pages: 25. [96-6371] (mcp)
1/17/97	PROOF BRIEF filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 1/15/97. Number of Pages: 87. [96-6371] (mcp)
1/17/97	Request to require oral argument (page 2) filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin [96-6371] (mcp)
1/21/97	BRIEFING LETTER SENT requesting brief corrections from Pamela R. O'Dwyer because Summary of Argument is required. Corrections due: 1/31/97. (mcp)
1/29/97	Amicus MOTION filed to allow Association of American Railroad for leave to file amicus curiae brief in support of appellant Norfolk Southern Railway Company. Motion filed by James Lacey O'Connell for Amicus Curiae AAR. Certificate of service 1/29/97. [96-6371] (mcp)
1/29/97	BRIEF TENDERED. Received from James Lacey O'Connell for Amicus Curiae AAR [96-6371]. Certificate of service date 1/29/97. (mcp)
1/29/97	AMICUS BRIEF filed by James Lacey O'Connell for Amicus Curiae AAR. Copies 7. Certificate of service date 1/29/97. Number of Pages: 20. [96-6371] (mcp)

DATE	PROCEEDINGS
2/3/97	"PROOF" REPLY BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co Copies: 1. Certificate of service date 1/30/97 [96-6371] (mcp)
2/11/97	APPEARANCE filed by Attorney James Lacey O'Connell for Amicus Curiae Association of American Railroads (AAR) [96-6371] (mcp)
2/11/97	Amicus MOTION filed to file amicus brief out-of-time. Motion filed by James Lacey O'Connell for Amicus Curiae AAR. Certificate of service date 2/11/97. [96-6371] (mcp)
2/13/97	APPENDIX TENDERED. Received from Everett Gibson for Appellant Norfolk So Ry Co. [96-6371] Copies: 5 (2 Volumes). Certificate of service date Corrections to be made: no certificate of service, index to list all exhibits and all documents to be listed separately; due 3/6/97 for Everett Gibson (ds)
2/13/97	APPENDIX filed by Everett Gibson for Appellant Norfolk So Ry Co. Copies: 5 (2 Volumes). Certificate of service date 3/27/97. [96-6371] (ds)
2/18/97	Appellee RESPONSE in opposition filed regarding a motion to allow amicus curiae to appear [1468-798-1] previously filed by James Lacey O'Connell for Association of American Railroads. Response from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 2/13/97 [96-6371] (mcp)
2/18/97	Appellee MOTION filed for leave to file amended designation of appendix contents. [1471953-1]. Motion filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 2/14/97. [96-6371] (mcp)
2/25/97	LETTER SENT by mcp granting motion for leave to file amended designation of appendix contents [1471953-1] filed by Pamela R. O'Dwyer [96-6371] (mcp)

DATE	PROCEEDINGS
3/3/97	FINAL BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co. Copies: 7. Certificate of service date 2/27/97 Number of Pages: 74. [96-6371] (mcp)
3/3/97	FINAL REPLY BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co. Copies: 7 Certificate of service date 2/27/97 Number of Pages: 28. [96-6371] (mcp)
3/4/97	BRIEFING LETTER SENT resetting briefing schedule: appellant final brief due now 3/28/97; appellee final brief now due 3/28/97 [96-6371]. (ds)
4/1/97	BRIEFING LETTER SENT resetting briefing schedule: Since appellee is now is receipt of the corrected joint appendix, the appellee final brief has been extended to 4/21/97. [96-6371]. (mcp)
4/23/97	Request to require oral argument (page 2) filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin [96-6371] (mcp)
4/24/97	FINAL BRIEF filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Copies: 7. Certificate of service date 4/21/97. Number of Pages: 94. [96-6371] (mcp)
7/3/97	Appellee MOTION filed for permission to file reply brief to the brief of amicus curiae filed by Association of American Railroads (AAR). [1554853-1]. Motion filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 6/30/97. [96-6371] (mcp)
7/3/97	APPELLEE REPLY BRIEF TENDERED. Reply to the amicus brief of amicus curiae Association of American Railroads. Reply brief received from Pamela R. O'Dwyer for Appellee Dedra Shanklin. [96-6371] Copies: 7. Pages 67. Certificate of service date 6/30/97 (mcp)

DATE	PROCEEDINGS
7/3/97	REPLY BRIEF filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Reply brief to amicus brief of Association of American Railroads (AAR). Copies: 7. Certificate of service date 6/30/97. Number of Pages: 64. [96-6371] (mcp)
8/28/97	Oral argument date set for 10/27/97 in court room 607. Notice of argument sent to counsel. [96-6371] (paw)
9/10/97	ORDER filed granting motion to allow The Association of Trial Lawyers to file an amicus brief [1456154-1] filed by Jeffrey Robert White, granting motion to allow Association of American Railroad to file an amicus brief [1468798-1] and granting motion to file the amicus brief out-of-time [1468805-1] filed by James Lacey O'Connell, granting motion of appellee for permission to file reply brief to intervenor Association of American Railroads [1554853-1] filed by Pamela R. O'Dwyer [96-6371]. Entered by order of the court. (mcp)
9/19/97	Appellant MOTION with memorandum in support filed to take judicial notice. Motion filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 9/16/97 [96-6371] (mcp)
9/22/97	CERTIFIED RECORD filed. Volumes include 7 Tr; 5 Dep; 5 Pl. [96-6371] (pje)
9/29/97	Appellee MEMORANDUM in opposition filed regarding a motion to take judicial notice and in support of the filing of appellee's-supplemental authorities, motion to take judicial notice [1596725-1] previously filed by Everett Gibson. Response from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date [96-6371] (mcp)
10/8/97	ORDER filed granting motion to take judicial notice [1596725-1] filed by Everett Gibson. Entered by order of the court. (mcp)

DATE	PROCEEDINGS
10/14/97	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 10/9/97 [96-6371] (mcp)
10/20/97	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 10/17/97 [96-6371] (mcp)
10/27/97	Date previously set for oral argument is cancelled. [96-6371] (me)
11/10/97	Appellee MOTION filed requesting oral argument via telephone or to expedite oral argument. Motion filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 11/7/97. [96-6371) (mcp)
11/14/97	LETTER SENT by mcp to appellant counsel requesting response to previously motion for telephonic argument or expedited oral argument [1626209-1,2] by Pamela R. O'Dwyer. Response due by 11/24/97 for Everett Gibson. [96-6371] (mcp)
11/25/97	Appellant RESPONSE filed with affidavits in support, in opposition regarding a motion requesting telephone argument [1626209-1] and no objection regarding a motion to expedite oral argument [1626209-2], motions previously filed by Pamela R. O'Dwyer. Response from Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 11/22/97. [96-6371] (mcp)
12/8/97	ORDER filed denying motion requesting telephonic argument [1626209-1] or expedited oral argument [1626209-2] motion filed by Pamela R. O'Dwyer [96-6371]. James L. Ryan, Circuit Judge, Alice M. Batchelder, Circuit Judge, Eric L. Clay, Circuit Judge. (mcp)
1/13/98	Oral argument date set for 2/5/98 in court room 403. Notice of argument sent to counsel. [96-6371] (paw)

DATE	PROCEEDINGS
2/5/98	CAUSE ARGUED on 2/5/98 by Everett Gibson for Appellant Norfolk So Ry Co, Pamela R. O'Dwyer for Appellee Dedra Shanklin before Judges Batchelder, Moore, Clay. [96-6371] (paw)
2/27/98	Attorney LETTER filed concerning citation at oral argument. Letter from Everett Gibson. Certificate of service date 2/25/98 [96-6371] (yh)
3/18/98	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 3/14/98. [96-6371] (mcp)
3/23/99	Appellee RESPONSE filed regarding additional citations filed by appellant. Response from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 3/19/98 [96-6371) (mcp)
3/27/98	Appellee LETTER filed regarding paragraph omitted from response of 3/19/98 (filed 3/23/98). [96-6371]. Letter from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 3/25/98 [96-6371] (mcp)
7/23/98	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 7/22/98 [96-6371] (mcp)
4/13/98	OPINION filed: The decision of the district court is AFFIRMED in all respects, decision for publication pursuant to local rule 206 [96-6371]. Alice M. Batchelder, Authoring Judge, Karen N. Moore, Circuit Judge, Eric L. Clay, Circuit Judge. (mcp)
4/13/99	JUDGMENT: The judgment of the district court is AFFIRMED in all respects. (mcp)
4/22/99	BILL OF COST filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Amount: $149.20. Certificate of service date 4/20/99. [96-6371] (mcp)
4/27/99	PETITION for en banc rehearing filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 4/27/99. [96-6371] (blh)

DATE	PROCEEDINGS
5/10/99	Errata to petition for rehearing en banc filed 04/27/99 by Everett Gibson for Appellant Norfolk So Ry Co. [96-6371] (blh)
5/24/99	ORDER filed denying petition for en banc rehearing [1932511-1] filed by Everett Gibson [96-6371]. Alice M. Batchelder, Karen N. Moore, Eric L. Clay, Circuit Judges. (blh)
6/1/99	Appellant MOTION filed staying issuance of mandate pending the filing of a petition for writ of certiorari. Motion filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 6/1/99 [96-6371] (mcp)
6/9/99	ORDER filed granting motion to stay mandate [1952760-1] filed by Everett Gibson. The mandate is stayed for 90 days from this order unless the court is advised that the petition for writ of certiorari has been filed. [96-6371] Alice M. Batchelder, Circuit Judge, Karen N. Moore, Circuit Judge, Eric L. Clay, Circuit Judge. (mcp)
6/29/99	CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [96-6371]. Volumes included: 5 Pl; 7 Tr; 5 Dep. (dag)
7/9/99	Record acknowledgment received from the district court. Acknowledged by: Barbara Hearn. Acknowledgment date: 7/7/99. [96-6371] (mcp)
8/30/99	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Norfolk So Ry Co. Filed in the Supreme Court on 08-20-99, Supreme Ct. case number: 99-312. [96-6371] (swh)
10/22/99	U.S. Supreme Court letter filed granting petition for writ of certiorari [2005114-1] filed by Norfolk So Ry Co [96-6371]. Filed in the Supreme Court on 10-18-99. (swh)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Civil No. 94-1212
Jury Demand
Judge Todd

DEDRA SHANKLIN,
individually and as next friend of her son
JESSIE GUY SHANKLIN

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
NORFOLK SOUTHERN CORPORATION,
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.

COMPLAINT

Comes the Plaintiff and sues the Defendants and for her cause of action would show unto the Court as follows:

I. JURISDICTION

1. The jurisdiction of this Court is invoked by the Plaintiff pursuant to Diversity of Citizenship as provided by 28 U.S.C. 1322, for a cause in excess of the jurisdictional limits.

II. NATURE OF PROCEEDINGS

2. This is an action for damages for the wrongful death of the Plaintiff's husband resulting from the negli-

gence of the corporation in their policy making and in the training of their employees and in the operation of their equipment.

III. THE PARTIES

3. Plaintiff is the widow of Eddie Shanklin and the mother of his child Jessie. She is a resident of Gibson County, Tennessee. She brings this action under the wrongful death statute, T.C.A. 20-5-106.

4. The Defendant Norfolk Southern Railway Company is a Virginia corporation doing business in Gibson County, Tennessee as an interstate carrier by rail. Norfolk Southern Corporation is a Virginia corporation which is a holding company and owns the stock of Norfolk Southern Railway Company. Cincinnati, New Orleans & Texas Pacific Ry. Co. is an Ohio Corporation doing business as an interstate carrier by rail in Gibson County. Hence forth in this complaint the defendants will be referred to as Norfolk Southern.

5. At all times material to this action the Defendant owned or leased the trackage in Gibson County, Tennessee which is intersected at the crossing by Oakwood Road and operated their railroad for the financial benefit of all corporate defendants in pursuit of interstate commerce.

IV. FACTUAL BASIS OF PLAINTIFF'S CLAIMS

6. On or about the 3rd day of October, 1993 at dawn (5:15), the Plaintiff's husband Eddie Shanklin was traveling in his automobile east on Oakwood Road at the location where it intersects the main line of track being used by the Defendant Norfolk Southern when he was struck broadside and was killed by the train being negligently operated by the Defendants as follows:

COMMON LAW NEGLIGENCE;

7a. Norfolk Southern failed to provide an adequate warning system or protective devices at the crossing in question, though they were aware of the ultra or extra hazardous local condition and its inherent danger to the unsuspecting motorist expected to use said crossing.

b. Norfolk Southern failed to sound the horn on said train as it approached the crossing within a reasonable time to give adequate warning to Mr. Shanklin so that he might stop before attempting to cross the track.

c. Norfolk Southern set its train speed and operated the train across the crossing under the highly dangerous conditions when it knew or ought to have known the unsuspecting motorists could be in a position of peril.

d. Under the circumstances of this crossing, Norfolk Southern operated the engine and train without keeping what a reasonable person would deem to be a proper lookout ahead considering all the factors which the defendants knew or ought to have known and failed to timely apply the brakes and reduce the speed under the circumstances as they approached the crossing.

e. Norfolk Southern failed to properly and carefully train and instruct and supervise the crew to avoid just such an eventuality as this incident presented.

f. Norfolk Southern failed to properly and carefully make policies to protect the traveling public, specifically this plaintiff's husband and did fail to make and implement appropriate policies or measures which were inexpensive and readily available including but not limited to the closure of this crossing and the negligent failure to signalize beyond the "next to nothing" protection afforded by "cross-bucks" and the notify the State Department of Transportation and to request that permission be granted to either close the crossing or that the Department designate the type of signals to be installed.

g. The crew of the train operated the train negligently in violation of the operating and safety rules and time-table of the defendant railroad.

h. any violations of the suggestions or requirements of the Manual on Uniform Traffic Control Devices which apply to the subject crossing.

i. failure to provide a safe sight distance for the Plaintiff's husband by reducing the height of any embankment and or clearing the vegetation from the existing bank.

STATUTORY VIOLATIONS

8a. T.C.A. 65-6-122

failure to construct and maintain the railroad tracks so that vehicles could conveniently and safely pass over same.

b. T.C.A. 65-11-101

failure to make, furnish and maintain a sufficient crossing at a public highway and keep the same in lawful repair.

c. T.C.A. 65-12-108(1) & (2)

failure to cause the train in question to sound its whistle or bell at a distance of one quarter of a mile from the crossing.

d. T.C.A. 65-12-108(4)

failure to implement the precautions required for prevention of accidents.

e. T.C.A. 65-11-113

failure to provide automatic warning or protective devices and not to exceed 25 m.p.h. speed limit in the interim.

f. T.C.A. 65-6-132

failure to cut down trees.

g. T.C.A. 65-11-103

failure to construct, maintain, and repair.

h. T.C.A. 65-12-108(3)

failure to keep a proper lookout ahead.

i. T.C.A. 65-12-109

makes a violation of 65-12-108 "Negligence Per Se".

V. DAMAGES

9. As a direct and proximate foreseeable result of the willful, wanton, gross negligence of the Defendants the Plaintiff's husband suffered pain and anguish in his dying and she has suffered financial loss, incurred expenses and has lost the right to her husband's support and consortium entitling her to recover compensatory and punitive or exemplary damages and pre and post-judgment interest in the maximum amounts allowed by law.

VI. PRAYER FOR RELIEF
WHEREFORE PREMISES CONSIDERED THE PLAINTIFF PRAYS

10 a. That proper process issue and be served upon the Defendant's requiring them to appear and answer within the time allowed by law.

b. That upon the trial of this matter, Plaintiff recover judgment against the Defendants, jointly and severally, for those damages set forth herein, as well as their court costs, prejudgment and post-judgment interest in the maximum allowed by law and for such other and further relief,

both general and special, at low or in equity to which Plaintiff may be justly entitled to recover.

c. PLAINTIFF DEMANDS A JURY TO TRY THE ISSUES WHEN JOINED.

PATY, RYMER AND ULIN P C

By: /s/ Pamela Rymer O'Dwyer
PAMELA RYMER O'DWYER
19 Patten Parkway
Chattanooga, Tn 37402
(615) 756-6770

WAIVER OF SERVICE OF SUMMONS

TO: Pamela R. O'Dwyer

I acknowledge receipt of your request that I waive service of a summons in the action of Dedra Shanklin v. Norfolk Southern Company, et al, which is case number 94-1212 in the United States District Court for the Western District of State of Tennessee. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after 9-26-94, or within 90 days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/Typed Name: _____

As _____ of _____

(Title) (Corporate Defendant)

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

WAIVER OF SERVICE OF SUMMONS

TO: Pamela R. O'Dwyer

I acknowledge receipt of your request that I waive service of a summons in the action of Dedra Shanklin v. Norfolk Southern Company, et al, which is case number 94-1212 in the United States District Court for the Western District of State of Tennessee. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after 9-26-94, or within 90 days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/Typed Name: _____

As _____ of _____

(Title) (Corporate Defendant)

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NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

TO: (A) John S. Shannon, 3 Commercial Place, Norfolk, VA 23510-2191

as (B) Executive Vice President

of (C) Norfolk Southern Corporation

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed.) A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the (D) Western District of Tennessee and has been assigned docket number (E) 94-1212.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within (F) 30 days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States.)

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth at the foot of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this 26th day of September, 94.

/s/ Pamela Rymer O'Dwyer
Signature of Plaintiff's Attorney
or Unrepresented Plaintiff

A—Name of individual defendant (or name of officer or agent of corporate defendant)

B—Title, or other relationship of individual to corporate defendant

C—Name of corporate defendant, if any

D—District

E—Docket number of action

F—Address must be given at least 30 days (60 days if located in foreign country) in which to return waiver

NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

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as (B) Executive Vice President

of (C) Norfolk Southern Corporation

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This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within (F) 30 days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

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If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth at the foot of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this 26th day of September, 94.

/s/ Pamela Rymer O'Dwyer
Signature of Plaintiff's Attorney
or Unrepresented Plaintiff

A—Name of individual defendant (or name of officer or agent of corporate defendant)

B—Title, or other relationship of individual to corporate defendant

C—Name of corporate defendant, if any

D—District

E—Docket number of action

F—Address must be given at least 30 days (60 days if located in foreign country) in which to return waiver

[Filed Oct. 17, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Caption Omitted in Printing)

ANSWER OF DEFENDANT
NORFOLK SOUTHERN RAILWAY COMPANY

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

In answer to the numbered paragraphs of the complaint, defendant, Norfolk Southern Railway Company ("Norfolk Southern"), states as follows:

1. Norfolk Southern admits the allegations contained in paragraph 1 of the complaint.

2. Norfolk Southern admits the nature of the action as alleged in paragraph 2 of the complaint, but denies negligence on its part or on the part of its employees.

3. Norfolk Southern admits the allegations contained in paragraph 3 of the complaint.

4. Norfolk Southern admits the allegations contained in paragraph 4 of the complaint except as to Cincinnati, New Orleans & Texas Pacific Railway Company.

5. Norfolk Southern admits the allegations as to it in paragraph 5 of the complaint except that its rail operations are conducted for the benefit of its shareholders.

6. Norfolk Southern admits that a fatal accident occurred at the time and place alleged in paragraph 6 of the complaint. Norfolk Southern denies negligence on its part.

7. Norfolk Southern denies the allegations contained in paragraph 7 of the complaint.

8. Norfolk Southern admits that the statutes set forth in paragraph of the complaint were in full force and effect at the time and place of the accident, but Norfolk Southern denies that it violated any such statutes.

9. Norfolk Southern denies the obligations contained in paragraph 9 of the complaint.

THIRD DEFENSE

1. The accident and resulting fatality were caused solely by the negligence of Eddie Shanklin in that at the time and place of the accident, Eddie Shanklin failed to keep his vehicle under proper control, failed to devote full time and attention to the operation of his vehicle, failed to keep a proper lookout ahead, and failed to bring his vehicle to a stop when he knew or in the exercise of ordinary care should have known that a train was approaching the crossing in hazardous proximity to the crossing.

2. Plaintiff is therefore barred from recovery in this cause under the doctrine of comparative negligence.

FOURTH DEFENSE

1. At the time and place of the accident, the following statute of the State of Tennessee was in full force and effect.

T.C.A. § 55-8-145. Obedience to signal indicating approach of train—Penalty.—

(a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within fifty feet (50′) but not less than fifteen feet (15′) from the nearest rail of such railroad, and shall not proceed until that driver can do so safely. The foregoing requirements shall apply when:

* * *

(3) A railroad train approaching within one thousand five hundred feet (1500′) of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard; and

(4) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing . . .

2. Eddie Shanklin violated the foregoing statute and the violation was a direct and proximate cause of the accident and resulting fatality.

3. Plaintiff is therefore barred from recovery under the doctrine of comparative negligence.

FIFTH DEFENSE

1. In 1970 Congress enacted the Federal Railway Safety Act which is codified at 45 U.S.C. §§ 421, *et seq.* The Secretary of Transportation in 1971 promulgated regulations under the act governing train speed. All common law duties relating to train speed have therefore been preempted by the Supremacy Clause of the United States Constitution.

2. In 1973 Congress enacted the Highway Safety Act of 1973 which is codified at 23 U.S.C. §§ 130, *et seq.* The Secretary of Transportation has promulgated regulations under the act governing standards for crossing warning protection where federal funds are committed to improve crossing safety.

3. Prior to the accident federal funds had been committed and used to improve crossing warning protection at Oakwood Road. All common law duties relating to crossing warning protection devices have therefore been preempted by the Supremacy Clause of the United States Constitution.

EVERETT B. GIBSON LAW FIRM
950 Morgan Keegan Tower
50 North Front Street
Memphis, Tennessee 38103
(901) 576-8211

By: /s/ Everett B. Gibson
EVERETT B. GIBSON
Attorneys for Defendant
Norfolk Southern Railway Company

[Filed May 7, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

JURY VERDICT

We, the jury, present the following answers to the questions submitted by the Court:

1. Considering all of the fault at 100%, what percentage of the total fault is chargeable to each of the following persons?

Eddie Shanklin	30%	(0-100%)
Norfolk Southern Railway Co.	70%	(0-100%)
	Total	100%

(If you find Eddie Shanklin's fault to be 50% or more, you do not need to answer Question 2.)

2. Without considering the percentage of fault found in Question 1, what total amount of damages, if any, do you find were sustained by the following parties:

Dedra Shanklin	$615,379.00

Date 5/7/96

/s/ [Illegible]
Jury Foreman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

JUDGMENT IN A CIVIL CASE

[×] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that in compliance with the Jury Verdict entered in the above-styled matter on May 7, 1996, judgment is hereby entered in favor of the plaintiff, Dedra Shanklin, against defendant Norfolk Southern Railway Company and damages awarded in the amount of $430,765.30.

IT IS FURTHER ORDERED that in compliance with the consent order dismissing defendants Norfolk Southern Corporation and Cincinnati, New Orleans and Texas Pacific Railway Company entered on March 29, 1995, judgment is hereby entered for the defendants Norfolk Southern Corporation and Cincinnati, New Orleans and Texas Pacific Railway Company.

APPROVED:

/s/ James D. Todd
JAMES D. TODD
United States District Judge

Date 5-8-96

ROBERT R. DI TROLIO
Clerk

This document entered on the docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 5-14-96.

/s/ [Illegible]
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

JURY CHARGE

* * * *

[9] Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this, and you should put it out of your mind.

The plaintiff contends that on October 3, 1993, at approximately 5:15 a.m., while it was still dark, her husband, Eddie Shanklin, was traveling in his automobile east on Oakwood Road in Gibson County, Tennessee, where it intersects the main line of a track used by the defendant, Norfolk Southern Railroad—Railway Company. He approached the Oakwood Road railroad crossing at a reasonable speed of twenty miles per hour when he was struck broadside and killed by one of the defendant's trains.

The train was being operated at a speed of forty miles per hour on a Class IV track, which allows speeds up to sixty miles an hour.

The plaintiff contends that Eddie Shanklin did not slow or react prior to the collision because he did not see or hear the train. The railroad failed to give sufficient visual or audible warning that the train was in [10] hazardous

proximity. The sight distance was obstructed by a house which limited the view of both Mr. Shanklin and the engineer.

The plaintiff contends that Eddie Shanklin was killed because of the following acts of negligence on the part of the defendant, Norfolk Southern Railway Company.

Number one: failure to identify the hazards at the Oakwood Road crossing and to provide adequate warning devices even though they were aware of the hazard.

Number two: failure to sound the horn on the train as it approached the crossing in time to give adequate warning to Eddie Shanklin.

Number three: failure to keep a proper lookout ahead as the train approached the Oakwood Road crossing.

Number four: failure to apply the brakes and reduce the speed of the train in a timely fashion as the train approached the Oakwood Road crossing.

Number five: failure to take reasonable precaution to provide a safe line of sight at the Oakwood Road crossing by removing vegetation and failure to request that vegetation not on the railroad's right-of-way be removed.

Number nine: failure to warn Eddie Shanklin of the proximity of the train by any method reasonably expected to be seen or heard. That was number six rather [11] than nine.

Plaintiff also contends that the defendant railroad violated a Tennessee statute in effect at the time of the collision and that that violation was the proximate cause of Eddie Shanklin's death. That statute is Tennessee Code Annotated 65-12-108, failure to sound the whistle or the bell of a train at a distance of one-quarter of a mile from a crossing.

The defendant contends that at the time of the collision, Norfolk Southern Railway's employees operated the train involved in compliance with all common-law and statutory duties. The headlight of the train was on, emitting a strong light. The engineer of the train sounded the horn at one-quarter of a mile from the crossing and continued to blow the horn until the impact occurred. The train was traveling at a speed of forty miles per hour when the brake was applied, which was within the applicable speed limit. Within 650 feet of the crossing it was impossible for the engineer to slow the train in time to avoid the collision. The train crew was not guilty of any acts of negligence.

The defendant railroad also contends that the Oakwood Road crossing was equipped with three advance warning signs and two reflectorized crossbuck warning devices, which comply with the Uniform Manual on Traffic [12] Control Devices. These warnings were reasonably adequate for the Oakland Road crossing, which is a predominantly rural crossing with no history of personal injuries prior to this accident.

The sole cause of the collision in this case, according to the defendant railroad, was the negligence of Eddie Shanklin. He was familiar with the Oakland Road crossing, as he lived six-tenths of a mile from it and used it at least twice a day each workday, and he would hear the train horn when his automobile was two hundred feet from the crossing and could see the headlight of the train from 135 feet from the crossing. Traveling at a speed of twenty miles per hour, Eddie Shanklin's stopping time was less than sixty feet, giving him sufficient stopping distance to avoid the collision.

The railroad contends that defendant Eddie—that plaintiff Eddie Shanklin failed to comply with his com-

mon-law duty to keep his vehicle under proper control, to devote full time and attention to the operation of his vehicle, to keep a proper lookout ahead and stop his vehicle when he knew or should have known that the train was approaching the crossing.

It's the duty of a railroad company to exercise reasonable care at public highway crossings to warn and to avoid injury to persons traveling upon the highway and [13] crossing the railroad tracks. The amount of caution required by a railroad company in the exercise of reasonable care must be commensurate with the hazards and dangers that are apparent to it or that would be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence.

The tracks of a railroad in themselves are a warning of danger. Before a person drives a vehicle into the space that would be occupied by a train if one were to pass over the tracks, it is his duty to use every reasonable opportunity to look and listen for the approach of a train, an engine or a railroad car upon the tracks and to yield the right-of-way to any approaching train, engine or car so near that it constitutes an immediate hazard. What is included in the term "every reasonable opportunity" depends on all the surrounding circumstances as they would be met and viewed by a person of ordinary prudence in the same position.

No failure of duty or of the customary practices on the part of those in charge of a train or of anyone handling or supervising any phase of its operation absolves a person going along the track area from the duty to use ordinary care for his own protection.

If the view of the tracks is obstructed or if the sense of hearing is impaired, then greater caution is [14] required in approaching them. The motorist is required

to look and see what is there to be seen in the exercise of proper care, taking into account the motorist's familiarity with the crossing. If the obstruction is such that one cannot obtain, without stopping, a reasonably assuring view of the tracks in both directions before entering the dangerous track area, then it is his duty to look and listen for the approach of a train, train engine or railroad car and stop, if necessary, and not proceed onto the dangerous track area without taking the precautions that a reasonably prudent person would take under the same circumstances.

Where a person apparently in full possession of his faculties and capable of judging the danger of his position is seen approaching a railroad track, the operator of a train may presume that he will observe a proper degree of care for his own safety and stop before getting upon the track.

The speed limit for the train at the crossing at issue in this case was sixty miles per hour, and the speed limit for the automobile was fifty-five miles per hour.

The failure of any engine driver to blow the whistle or ring the bell at any public crossing so designated by either the railroad company or the public officials shall constitute negligence.

[15] In order to prevent accidents upon railroads, the following precautions shall be observed. On approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one-fourth of a mile from the crossing and at short intervals until the train has passed the crossing. Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal or other obstruction

appears on the road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident.

A statute which requires that the engine bell be rung or the whistle blown when a train approaches a crossing, but which does not require a flagman or automatic signal there, is not intended to furnish a standard by which to determine whether or not in every case the railroad has discharged its duty in respect to giving warning of the approach of a train, but is intended, rather, to prescribe the minimum of care which must be observed in all cases.

In order to prevent accidents upon railroads, the following precautions shall be observed. I've already read you the statute requiring the bell or whistle to be blown a fourth of a mile prior to the crossing.

[16] An exception to the general rule is one in which the conditions of the crossing create an ultrahazardous situation. An ultrahazardous situation or a trap exists where the conditions at a railroad crossing are such that the railroad employees knew or should have known that a motorist might not be able to see the railroad in time to avoid the collision.

To fulfill the duty to give timely warning, the train company must take such actions that safety and common prudence dictate. Reasonable care and common prudence may encompass providing additional warning devices if the crossing is more than ordinarily hazardous.

The mere fact that a railroad has complied with statutory requirements does not fulfill the entirety of the railroad's duty to a driving public where an extra hazardous crossing is involved. Common-law negligence can exist even where the railroad has met the statutory requirements.

All persons or corporations owning or operating a railroad in this state are required to make and furnish good and sufficient crossings on the public highways crossed by them and to keep such crossings in lawful repair at their own expense. Irrespective of a state or local government's authority to place safety devices at a grade crossing, this allocation of authority does not relieve the [17] railroads of their duty to take all reasonable precautions to maintain grade crossing safety.

When a train and a vehicle arrive at a crossing at the same time, the train generally has the right-of-way; however, the privilege to exercise the right-of-way by the train is accompanied and conditioned upon the train giving a due and timely warning.

In deciding this case you must determine the fault, if any, of each of the participants. A participant is a person, corporation or other entity who participated in the events leading up to this action. If you find that more than one of these participants are at fault, then you will compare the fault of the participants. To do this, you will need to know the definition of fault. A participant is at fault if you find by a preponderance of the evidence that the participant was negligent and that the negligence was a proximate cause of the injury or damage for which a claim is made.

Fault, insofar as a negligence claim is concerned, has two parts: negligence and proximate cause. Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do or the failure to do something that a reasonably careful person would do under circumstances similar to those shown by the evidence. * * *

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF BERNARD ABRAMS

* * * *

[113] FURTHER DIRECT EXAMINATION

BY MS. O'DWYER:

Q Dr. Abrams, let me ask you, sir, if you have visited at our request the crossing at Oakwood/Church Road where Eddie Shanklin was killed October 3rd, 1993?

A Yes, I have.

Q And did you—upon visiting that crossing and after review of various scientific documents and also deposition testimony and so forth, did you formulate an opinion as to the cause of the—of Mr. Shanklin being hit by the train?

A Yes, ma'am.

Q And what was that opinion?

[114] A Basically my opinion was the failure to give warning to an approaching driver that a train was about to be there which is given by various signalizations or other terms to tell the driver in the existing signalizations such as a locomotive light would not have been sufficient to foliage, blockage by a house. It by its very nature was 75 years old in concept that, therefore, Mr. Shanklin was not prepared for seeing—visually seeing a train by the information he was receiving as he approached the crossing.

Q You mentioned by its very nature 75 years old. What was it that you're speaking of?

A When referring this point to the locomotive light, the conceptual idea of the locomotive light was to place it high 75 years ago so that they wouldn't run into animals or things on the tracks. It's basically for the benefit of the locomotive engineer for the safety of the train sequence on the tracks. But automobiles were unheard of 75 years ago practically.

Q Did you rely on the Code of Federal Regulations' definition of what that light is required to do in order to support your opinion?

A Yes, ma'am.

[115] Q What is the actual minimum light required to do?

A The Code of Federal Regulations gives specific quantitative amounts to the railroad light and basically says it has a minimum candela of 200,000, and it must permit the engineer to see an object down the track at 800 feet. And that is a minimum statement. In reality they're about 250,000, and most trains have two of them. And they're about 14 feet, 10 inches high, but they're a very unusual design. They're a very narrow focus.

For those of us who go fishing, I take my flashlight, and I have two beams, one very narrow beam that lets me see something right down the line and one sort of a wide beam that diffuses and scatters light. The railroad's light on the locomotive by design is very narrow, and as soon as you're five degrees off the axis so ever slight, it drops an intensity to almost 80 to 90 percent. Maybe I could show you this on a drawing.

Q I wanted you first to do one other thing to represent what you've just said. Yet me show you what's been marked as Plaintiff's Exhibit No. 19 which I would like

to offer into evidence. And I have shown it to Mr. Gibson.

* * * *

[117] Q Among that research is there—is one of those treatises or reports from the one that you have actually gone out and done testing and verified yourself?

A One, I believe, you're referring to is one written in 1971 sponsored by the department of transportation, and its written by a Mr. Aurelius, and he researched the various aspects of the existing—

MR. GIBSON: Objection to hearsay, Your Honor.

THE COURT: Yes, sir. Ask this witness his opinion without asking him to repeat the hearsay on which you based that opinion.

Q (By Ms. O'Dwyer) Did you rely on that report to formulate your opinion, and, if so, what is your opinion as to the railroad's responsibility for providing this?

A I relied on it, verified it. Maybe I'm not answering the question or understanding improperly. It's the railroad's responsibility to provide good light as specified.

Q What did you formulate as an opinion about [118] their provision of a warning if they rely on only the light that is the minimum standard in the Code of Federal Regulations?

A The existing light through the Code of Federal Regulations in my opinion within reasonable scientific certainty is an inadequate warning device for a driver of a vehicle approaching a rail highway crossing.

Q Did you observe at the Oakwood crossing any other factors—let me take your board down for just a minute in case you want to look at Mr. Burnham's example here—that also contributed to any opinion you might have as to the fault of the railroad in not providing adequate warning?

A Basically the train if its light is 14 feet, 10 inches high was traveling in this manner, when you look at it from the side viewpoint, it looks like an ordinary street light. There were street lights in the background on U.S. 42 that appeared—

Q Dr. Abrams, you'll have to speak up. You can stand down, but you need to speak up.

A Okay. I'll try and get my voice up, and I do apologize for that. Basically we have the train moving in the general direction, and there's a house blocking right about here. There's sight line [119] blockages all the way through here. There's a vertical rise that the car must come up, and the railroad light is not only 14 feet, 10 inches high. It's approximately 20 feet higher than the driver.

In the background is U.S. 45, I believe, east. And there are luminaires known as street lights along that road. When you look at them together, they all have an equivalent type of look because the side of a railroad ight is not as bright as when you look straight into it.

Q Is there anything at this crossing that obstructs the view of the light even if it had been in your opinion adequate?

A. Basically the answer is yes, probably because of its location. These are all trees, foliage. However, also as one comes up the drive, there is a house right at this point here. There is a ditch here and sort of an embankment in this area.

Q How do you refer to that triangle that's created by the blue line in regard to when the driver finds himself there?

A This is what's commonly termed as a sight triangle, S-I-G-H-T, and basically refers to the plot of land and whatever obstructions may be within it. Those are physical, but at nighttime we have [120] additional obstruction called darkness.

Q Go ahead. I'm going to let you stand up. I know you prefer to stand up. In this particular picture I want you to tell us about what your opinion is as to the usefulness of what you see on the front there that's being flashed at by the camera.

A What we have here is the railroads and signals. It's much brighter than it is because this is taken with a flashbulb. It's a white paint that's on the front that is reflectorized but not retro-reflectorized. Because the railroad lights are high, they do not light up. It has no protective mechanism or help as far as vision is concerned.

Q Was that addressed in the Aurelius report as far as conspicuity?

A He addressed the fact in his opinion. I certainly agree with it that the consistency of this type of a—

MR. GIBSON: Whose opinion?

THE WITNESS: I am giving my own opinion.

MS. O'DWYER: He's giving his own opinion.

THE COURT: I'm having a hard time [121] hearing.

THE WITNESS: I'm sorry. I'll get my voice up, sir.

THE COURT: When lawyers get witnesses down off the witness stand, it makes it difficult to hear. The government spends hundreds of thousands of dollars getting us microphones.

A I'm sorry. I'm a gentle soul, and I speak gently. Basically what we have here is lack of contrast. It's hard to see a black object on a black background, so that means low conspicuity which in plain words means hard to see. The white emblem is the emblem that this particular railroad places on their engine. What the sum total of all this means is that it doesn't help an approaching driver see a train or locomotive rather. Is that better?

Q (By Ms. O'Dwyer) That's fine. Why don't you pick up your chalkboard, Dr. Abrams, and illustrate for us your opinions in regard to—that support your opinion

that Eddie Shanklin was not given adequate visual warning by the headlight.

A If one takes—

THE WITNESS: Can you hear me, sir?

THE COURT: Yes, sir.

[122] A To look directly into the light like one looks into a flashlight, it would have a very intense light, just a complete circle with flare. You would have discomfort and disability, but that isn't the way we approach a railroad crossing. These are the tracks, and this is the road. What basically happens, we look at it from the side by design. It's in this manner.

However, it's like turning a flashlight. It becomes very dim unless it's right at you. If you look at it from the side, you see a very pale light that gets paler and paler as it extends out. It has a yellowish cast. I'm not being technical, but all colors have what's known as a color specification. And the electromagnetic spectrum red is 700. Blue is 400, or if you buy what they call blue blockers—those are the red glasses, and they block out the blue at the other end.

Well, what we have is the fact that because of the filament and the design of the railroad light, it has a yellowish appearance that appears as a point source of the distance and is very similar to the commonly used yellowish luminaire or street light, and it's hard to distinguish. So if one were to have the small light coming from here and coupled here from a [123] distance they would have very similar to identical appearance.

Q (By Ms. O'Dwyer) If you could, get back by the mike there and sit down for just a minute. In formulating your opinion did you review the testimony of the train crew who was driving the train that struck Mr. Shanklin?

A Yes, ma'am.

MS. O'DWYER: Your Honor, for the purposes of this witness I'm going to offer in the three train crew statements rather than anything from the depositions with the approval of Mr. Gibson. These are Exhibits 24, 25, and 26.

THE COURT: Any objection, Mr. Gibson?

MR. GIBSON: No objection, Your Honor.

THE COURT: Mark those.

Q (By Ms. O'Dwyer) These statements, let me set these up here so we can see what we're talking about. Did you attach any significance to the train crew's statement, or three statements actually, to the fact that the train crew did not see Eddie Shanklin who was traveling at, according to those statements, at 20 miles an hour and that he did not [124] slow or react?

A There are two factors to it. One is it reinforces the fact that there was a sight blockage there of foliage. Mr. Shanklin didn't see them. They obviously didn't see him. They go hand in hand. The other aspect is that if they could only see him at this short distance, he obviously could only see them because a light is up above, so it was a no win situation for Mr. Shanklin.

Q How would you describe the position he found himself in?

A I would have to say this. He was trapped in the fullest sense of the word being trapped. He had already committed to go up and over the vertical rise. He didn't have any other reason not to. And then suddenly he was up on the track with the impact, and he was trapped with no method of getting out of the trap, I guess, is the only way to say it.

Q What is the purpose—from the aspect of warning, what should the warning do?

A Any type of a warning should tell the person driving a vehicle what's about to occur in front of them.

Q Does the crossbuck tell anything to the driver as to what's about to happen?

[125] A The crossbuck by definition is classified as passive. In other words, it doesn't tell the driver a train is there. It doesn't tell them a train is about to be there. It merely says somewhere in space out here there's a rail highway crossing.

Q What about the advanced warning sign, the railroad yellow sign? Does that provide anymore information to the driver that a train is coming?

A That's a redundancy in the sense that it tells, in fact, there is a crossing out there, but it still doesn't locate it. It doesn't tell you a train is coming or a train may be occupying a crossing.

Q How does in this situation—at the crossing where Mr. Shanklin was hit, how does the obstruction view affect the amount of time that Mr. Shanklin had to react to whatever information he would have got?

A As we pointed out before in the sight drawing the entire right sight triangle was blocked, so as he approached the crossing the time that he had to note that a train was about to be there was shortened an enormous amount of time to the point that he couldn't react and prevent, save, his own life.

Q Have you participated in the studies involving how much warning should be given to a driver of a rail grade highway crossing?

* * * *

[127] article, and, if you would, tell us about that article and how you made a determination as to what would be an adequate warning for a motorist at a crossing?

A We wrote the article. It was a whole chapter, in fact. We use it for teaching, but it's about the difference between the two types of crossings. One is a passive where no time frame is given, no location, all decisions of the driver. Then we looked at those that have signali-

zation of flashing lights or gates that somewhere say, hey, Mr. Driver, up ahead of you a train is about to enter or is on the crossing. In those areas the time frame is considered 20 seconds necessary so the driver can get prepared to stop at a crossing. So when one sees a flashing light, they come on approximately 20 seconds before you would arrive at the scene.

Q How if you did use the driver's perception reaction time and braking time in making that—formulating that opinion?

MR. GIBSON: Your Honor, excuse me. Is the opinion the witness just stated have to do with flashing lights and gates? If so, I believe it's irrelevant.

THE COURT: Restate the question so [128] the witness understands what you're asking.

Q (By Ms. O'Dwyer) The 20-second rule that you just pronounced as your opinion as to what would be—the article that you wrote about inadequate warning, does that apply also to crossbuck crossings, passive crossings, that they should have that or more warning, less warning?

A I understand better. The answer is my opinion within a reasonable scientific and visual certainty, yes, the 20 seconds is needed to send the information to the brain to the visual pathway to create the ability to stop in time at a crossing.

Q And how does the perception reaction time of a driver figure into the analysis that any particular time, the 20 seconds or anytime, is needed?

A It refers that there's not enough time necessary, first, to detect something, whatever it may be to identify it as perhaps a danger, to recognize that you must do something about it, then to react by accepting a message to the brain, and then you must do what's known as a maneuver, take your foot off the gas, put it on the brake.

All of this takes time. If it's an unexpected event that you've never seen before, it can add confusion and, again, lengthen the time. All of this elongates into [129] a considerable amount of seconds.

Q What number of seconds is the reaction time?

A The perception reaction time by Ashtoe is 2.5 seconds. That refers to sort of a medium. It could be more or slightly less, but at nighttime it's more. And then you have to add in the bits of information that you have. For example, in this case the driver was going down a dark two-lane road. He had to be careful. He had an incline. That's a second bit of information. He had the rondel (phonetic). That's a third piece of information. The mind can be overloaded. Then when you have an unexpected event, it shoots up the reaction time and lengthens it considerably.

Q Did you—did part of your opinion rest on the fact as to whether or not this train was a scheduled or unscheduled train?

A Yes, ma'am.

Q Which is it?

A This is an unscheduled train as I understand it.

Q Did you formulate as part of your opinion what, if anything, the railroad should have done that they failed to do at this crossing? And, again, be cautious. * * *

* * * *

[133] CROSS-EXAMINATION

BY MR. GIBSON:

Q Dr. Abrams, am I to understand that you're telling this jury that in your professional opinion a person approaching a crossing like this protected only by cross-

bucks should have 20 seconds advanced notice before a train reaches that crossing?

A That would be the recommended—yes, sir.

Q That's your recommendation?

A Yes, sir.

Q And, as you know, this vehicle was traveling at 20 miles an hour. You recall that from your investigation?

A Yes, sir.

Q Which you will agree is approximately 30 feet per second.

A Yes, sir.

Q So 20 seconds would be a length of 600 feet, right?

A Yes, sir.

Q Two football fields?

A Yes, sir.

Q So in your professional opinion in order to [134] give a motorist adequate warning that's proceeding 20 miles an hour down a road at night towards a crossing with just crossbucks, you've got to let that motorist know there's a train coming two football fields before the motorist gets to the crossing; is that it?

A No, sir.

Q Well, what did I miss?

A You missed the speed that's permitted on the road.

Q Well, we're talking about this lawsuit.

A On this road.

Q This motorist didn't need any 20 seconds advanced warning going only 20 miles an hour; did he?

A Generally you are right, sir.

Q You refer to the Code of Federal Regulation requirement of brightness of a railroad headlight, and I believe you said that the code provides that it must be at least 200,000 candelas; is that right?

A Candela.

Q Is that the same thing as candlepower?

A Well, there's a—without getting into too much physics, it's a general statement, and it's the total amount of light emitted from a source.

Q But it's a reasonable proxy for the term candlepower?

[135] A I would have to agree with you, yes, sir.

Q Dr. Abrams, you as a motorist, have you ever approached a yield sign? Do you have those up in Ohio, an inverted triangle with the word "yield" on it?

A Yes, sir.

Q And if you approach a yield sign and you're a driver, do you put your foot on the brake or have it positioned to go on the brake quickly if needed?

A I think that's one of the elastic situations depending upon the visual footage being given as you approach that crossing.

Q I'm not talking about the crossing.

A Or that intersection or whatever the yield is there for.

Q Isn't it a common practice for you to get your foot situated where you can reach the brake quickly as you go through that—

A Not always, no, sir.

Q But this railroad crossbuck is the equivalent of a yield sign; isn't it?

A Not in my opinion, sir.

Q Isn't it true that a motorist under law is required to yield to the approaching train when a train is approaching a crossing with a crossbuck [136] present?

THE WITNESS: Am I in the area of law, Your Honor?

THE COURT: Hold on a minute.

MS. O'DWYER: He asked him a question, Your Honor. He ought to be allowed to answer it.

THE COURT: He's asked him the question, and you need to answer the lawyer's questions until you hear one of them say objection, and you'll hear them soon enough.

THE WITNESS: I don't want to do anything wrong.

THE COURT: Answer them until you hear one lawyer say object, and then we'll stop, and then I'll rule on the objection.

THE WITNESS: Thank you, sir. If it says don't walk on the grass, I don't walk on the grass. That's all there is to it.

THE COURT: I'm with you on that.

A The yield is only if something is visibly and discernibly there. Otherwise you do not yield.

Q (By Mr. Gibson) But the point is, you have to be prepared for that event in case it happens; don't you, Doctor?

[137] A The point I'm making, sir, is visually you have to be prepared. If you're not visually prepared, the answer is no, sir.

MR. GIBSON: I have no further questions.

THE COURT: Anything else, Ms. O'Dwyer?

MS. O'DWYER: Nothing further, Your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you for your patience.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF ARCHIE BURNHAM

* * * *

[7] Q During that time or after retiring from the Georgia DOT, did you participate in the preparation of the manual on uniform traffic control devices?

A Yes. Throughout my career in government I worked on the national level in helping form the standards and policies that are active in the railroad crossing areas. There is a committee called the National Committee on Uniform Traffic Control Devices that formulate the specific design criteria and the warrants for application of all of these devices, signs, signals, and markings.

I served for a period as chairman of the section part 8, they call it, that deals with the rail highway grade crossing exclusively. There's a portion of that manual that contains all these regulations and standards, and I was the chairman of the group when that material was brought into the manual and published. After that time I became the vice chair of the entire national committee, and I held that position until I retired from government in 1988.

* * * *

[89] Q (By Ms. O'Dwyer) Is this something new to the industry?

A No, ma'am. The sight distance triangle may have been published in the first edition in 1976. I have to confess that I was one of the coauthors of that, and I can't recall readily whether that drawing was in there or not.

It was in the second edition published in 1986. But it's not new. It's something that's recognized in the industry as a means of evaluating various speeds of approach to both trains and cars to see what's necessary to give the motorists an opportunity to stop. You can't stop the train. You have got to be sure that the motorist has enough information so that he can stop the vehicle, and that's the purpose of that chart.

Q At this particular crossing where the motorist does not have adequate sight line, does that affect in any way his ability to see or hear the train with any warning that they might give?

A Yeah. Obviously, that's a restrictor. The only way to get the information to the motorist that the train is coming at a passive crossing that only has a crossbuck is by what the motorist is given to see or his ability to hear. It's this kind of condition with this kind of restriction that makes it [90] very tough. In fact, it makes it impossible. I call it a trap because the information is received too late after the motorist is gone past which is called the point of no return or the non-recovery error. At that point if he gets the information, it's too late. When he starts to try to stop, he will ultimately end up in front of the train.

Q Where on your chart is that point of no return?

A Well, for 20 miles an hour it starts at this 135 foot point that's listed right here on the highway. In other words, any motorist that passes that point faster than 20 miles an hour is not going to have a chance to receive any kind of information. If he had availability back this far but with this actual condition when he has only the sight available to this point, he doesn't have a chance. Once he's sighted the train, it's too late. He's going to get hit.

(Counsel reviews documents.)

A While we're on that point I've done a detail analysis of this sight distance relationship—

THE COURT: Let's wait until the lawyers are back with you because there's always a likelihood for both or one of them to object to [91] something.

Q (By Ms. O'Dwyer) I want to be able to hand you these photographs so that you could give the jury an idea about the engineer's view and how this restriction to the crossing affects his ability to see the driver.

A Yes. All of these photographs are from the locomotive engineer's view. And they are taken in different positions as he comes down this rail, and you can see it is equally restricted. The motorist can't see the train. The engineer itself can't see the motorist. You'll see from those photographs this engineer is actually coming down through a tunnel where the roadbed on both sides of the track is even higher than the track bed. So he's coming through a tunnel and looking down here, and his obstruction is restricted from this way for the same reason that the motorist obstruction exists this way, and that's what those photographs are.

Q Just for the moment so that we can be a little more detailed, let the jury take a moment to see these. Exhibit No. 9, engineer's view from 550 feet, can you tell the jury how many seconds that would be to the point of Mr. Shanklin's death?

A The train is traveling 40 miles an hour.

[92] MS. O'DWYER: May I pass these to the—offer them for admission into the record?

THE COURT: We'll send all the exhibits back to the jury at the end of the trial. That keeps from turning a one-week trial into a three-week trial.

MS. O'DWYER: Very well, Your Honor.

A The answer to the question is 8.3 seconds. The train is traveling 40 miles an hour which is roughly 60 feet per second divided into 500 feet is 8.3 seconds. So

that's how long it would take to get from this point on to the point of impact there at the crossing.

Q (By Ms. O'Dwyer) And this photograph at 225 feet can you tell how far back—how many seconds back from Mr. Shanklin's death this would have been taken? And this is the foldout that does not have an exhibit sticker on it, and we'll have to mark it.

A The train is 3.75 seconds from impact at that point, 225. That point would be just before it comes into view under the 74. So the train is only 3.75 seconds away at the 225 that the photograph was made.

MS. O'DWYER: For the record, Your Honor, for the sake of time, we had marked the one [93] that was not hooked together, so we'll put this as the next consecutive number which would be 16.

Q (By Ms. O'Dwyer) Mr. Burnham, if you could, take a look at the next picture in front of you there, and display that for the jury. Tell us, sir, what that represents as far as—because I think we're losing sight of the fact that this was at night. What does that represent what Mr. Shanklin would have seen each evening or morning as he was going across the crossing?

A This is a very important picture because it indicates as the motorist is traveling eastbound direction, it looks into this quadrant. On any trip in the hours of darkness he's already going to see two street luminaires off in the distance here. But you lose your perspective as you approach on this road to know where those luminaires are. And it can be confusing when an additional source, head lamp of a train, would come into view whether you're looking at the same old luminaires you've seen before or whether there's another one that's come into the picture.

MS. O'DWYER: For the record we'll offer that as Plaintiff's Exhibit No. 17.

Q (By Ms. O'Dwyer) Mr. Burnham, tell us what [94] other information you relied on to substantiate your opinion as to whether or not the appropriate warning was given by either sight or sound to Mr. Shanklin?

A Well, there's several other sight references that I used. I have two short videos that would indicate the perspective of this drawing and show you factually what existed at the scene if I could be allowed to show it.

Q We'll have to wait to get to those.

A I have two here now.

Q Well, let's go ahead and do that. While I move this up—

THE COURT: Mr. Gibson, if you need to resituate yourself, you may do so.

MR. GIBSON: May my client situate with me?

THE COURT: Yes. At the end of the jury box might be a good place.

A This is a very short video showing that critical quadrant and how fast the train goes through it. This also shows you the amount of greenery, the trees and limbs you have to look under.

Q (By Ms. O'Dwyer) Is that about to run again?

A Yes.

MS. O'DWYER: Your Honor, I would [95] like to offer Mr. Burnham a clock so he can begin that when we get to the twelve and tell us how many seconds the last seconds of Mr. Shanklin's life this represents.

A It started at one after and went to about four seconds. And that's the point of this. It's a very quick situation. The train just comes into view, and then it's gone. And the things I want to also point out here are these trees that I had represented on the drawing. This is what they look like in a real life situation. You get a very quick glimpse of them, but you can see that. The one I want to show you which is a little bit longer deals with

the computer simulation. I've examined in some depth the time distance relationships with respect to where the train was at the time where Mr. Shanklin was. This is a computer simulation that shows you that. It just takes a second to run. There are a couple of things I'd like to—I may have to rewind this. I'm not sure.

Q (By Ms. O'Dwyer) I think so.

(Playing videotape.)

A This represents the train approaching at its speed of 40 miles an hour and the vehicle approaching at 20 miles per hour. This simulation is set up to [96] evaluate —that's what all these numbers are over here—at any given point in time 500th's of a second to be able to see where each vehicle is in relation to the other.

The reason that's important is because while we had a restricted sight distance of only 174 feet it's even a worse story than that because the train didn't even get to the 174 foot point because Mr. Shanklin was 94 feet from the rail. So he literally had three seconds of time from when the train came into view before the collision, and it takes 3.4 seconds for a motorist to be able to react and brake under those conditions. And that's what this simulation documents, and we have a computer printout that has all that listed down there. I just wanted you to see the video that shows how it was put together and how it was analyzed. That's another one of the things that we would rely on and advising you our opinion that this is a duly ultrahazardous crossing due to a sight restriction.

Q (By Ms. O'Dwyer) You mentioned to the jury something called the braking time. How does an expert in your field or engineer arrive at the appropriate braking time for a situation like Mr. Shanklin found himself in?

[97] A To stop a vehicle obviously you would have to brake it, and that means you would have to apply the

brake petal and stop the vehicle for whatever speed you're traveling. It takes a various amount of distance depending on what your speed is. At 20 miles an hour the calculation I made was allowing a 1.5 seconds of reaction time which is even better than the design reaction time of two and a half seconds. And then I added the amount of distance to brake the vehicle and added the 15 feet to keep him braking so he did not get on the rail. In other words, stop at 15 feet short of the rail. That took 94 feet. That happens to be at the point that Mr. Shanklin would be when the train comes into view at the 170 foot point.

Q Do you know, sir, whether trains are wider than the rail?

A Yes. They overhang about 30 inches on either side of the rail. That's why you establish a zone of 15 feet from the rail called the hazard area. The goal is to keep vehicles out of the area of the train.

Q Tell me again about the reaction time. You said there was the 2.5 reaction time that is the design time. What do you mean by "design time"?

[98] A Well, the standards in the literature currently call for two and a half seconds. There's a lot of research going on to say it should be increased even more than that because there's a lot of older drivers in the driving population now. But currently it's two and a half seconds.

There are some occasions where people with extremely good reflexes and so forth can do better than that and I presume the best case situation as far as that went to try to get a good reaction time. I don't think it's realistic to take it any lower than that because you have to appreciate this as an unexpected event. And whenever you violate the driver's expectancy, it takes more time for them to recover what's been violated.

And in particular any railroad crossing where you have multiple repeat trips by familiar drivers, they become so

accustomed to the fact that they passed that point last time and successfully went across because there was no train, they think that that becomes the pattern, that it can happen every time. So if the train is coming, it's a very unexpected event, and it will take them longer to react to put into action some evasive movement. That's why I used the number of one and a half presuming the best case [99] situation Mr. Shanklin might have had great reflexes and super sharp, but at the same time he was caught in a situation where it would not be possible for him to stop under the conditions of the time distance relationship he faced.

Q You've spoken several times in that analysis about the literature. Tell us, if you would, is that literature available at the railroad?

A Yes, it—

MR. GIBSON: Objection, Your Honor. She's going into something you've already ruled on.

MS. O'DWYER: Now, just a minute.

THE COURT: Let's talk about it.

(The following proceedings were had at the bench by Court and counsel out of the hearing of the jury:)

MS. O'DWYER: I just want to offer these for evidence, Your Honor. Of course, we had to try to take this signal—

MR. GIBSON: All of these paragraphs were taken after the signals were installed. Before the trial began today I agreed with Ms. O'Dwyer that she could use that one because she did a pretty good job of hiding it; although, a

[101] MS. O'DWYER: That one is good; isn't it?

THE COURT: I think that one is okay. If you turn it a certain way, they may can see that there's something wrong with it, but they may think it's just a smudge. I don't think they'll see that one.

MS. O'DWYER: Thank you, Your Honor.

THE COURT: Anything else?

MR. GIBSON: Well, I would like to reserve an objection to number—Plaintiff's 12 and Plaintiff's 15.

THE COURT: Let me see. Okay. Your objection is to 12 and 15; noted.

(Thereupon, the following proceedings continued within the hearing of the jury.)

Q (By Ms. O'Dwyer) What did you rely on to formulate an opinion that in addition to not having adequate sight distance that Mr. Shanklin was not given an adequate warning by either horn or light? And start, if you would, with horn so we can divide them up.

A Well, I evaluated the capability of being [102] able to hear the horn on this particular crossing. The law of physics tell us that the horn will degrade at the inverse function of the distance that the source is away from the point. That sounded too long. Let me break it down.

If you emit a sound, any sound, whatever level that's on, then 100 feet away it's going to come down a certain unit, and 200 feet it comes down twice that. And 400 feet it comes down a third time and so forth down the line. The standard horn on a locomotive puts out 96 decibels 100 feet in front of the engine. So 200 feet in front of the engine it's only emitting—it's only projecting 90 decibels. 400 feet it's down to 84. 800 feet its down to 78 and so forth.

And when you understand that the sound is diminishing as a function of distance, you realize it becomes very critical whether that horn has sounded in proximity to the crossing because obviously the closer it is the louder it's going to be. And the further away it is it gets to a certain point where it's not effective. It can't be heard.

We examined the noise levels in the vicinity of the crossing, and we found it to be relatively quiet, around 58 decibels, I believe. We've got a chart on [103] that.

And we found the noise level inside the vehicle when it was moving, and we took an exemplary vehicle like the '76 Monte Carlo like Mr. Shanklin was driving, and we found that we could measure inside the vehicle a decibel level of 80 to 82 decibels. Where there's no activity at that crossing the decibel level was 78. Inside the vehicle was 80 to 82. And, of course, the train 200 feet away it's going to be 90.

Now, the significance of that is to hear anything you've got to have a decibel level, a noise of about nine decibel levels higher than what your environment is. So here we have a vehicle that's 80 to 82. It could only hear something that's 89 to 91 decibels which happens to be right about the breaking point of what the train would be producing if it was sounding the horn when it's 200 feet away. We don't know for sure it did that.

We do know that there's testimony that the horn was sounded, but the horn was sounded from a quarter of a mile away on into the crossing on a fixed pattern, too longs, a short, and a long. Well, between those patterns there's a gap of nothing being sounded. And, of course, whenever that last blast is sounded, there's a gap from there on. So if the [104] train is more than 200 feet away when the last blast of the horn is sounded, it doesn't have the numbers that could penetrate a noise level for someone inside a closed vehicle, that is, a 1976 Monte Carlo approaching the crossing.

We acknowledged that the horn was sounding because there are witnesses, a train crew, someone driving down parallel to the train that heard the horn. And we know where the horn was sounded according to the testimony and followed a certain pattern. But we don't know that it was still going when it was 200 feet from the point of impact. And when it was 200 feet from the impact is only when it would be loud enough that it could be heard by someone inside the vehicle.

And, of course, as you had me calculate a minute ago 200 feet away from the point of impact is just a matter of three or four seconds, a very short period of time, so very possibly sight and sound of the approaching train could have been received by Shanklin at the same point in time. And as I've demonstrated earlier that point in time, 94 feet away from the rail, is just too late. You're in a non-recovery predicament.

Q On what did you rely for your determination [105] that the horn is required to be 100 decibels—I'm sorry, 98 decibels 100 feet in advance?

MR. GIBSON: 96.

Q (By Ms. O'Dwyer) I'm sorry, 96 decibels 100 feet directly in front of the train?

A That's the standard of the industrial. It's printed in the federal laws that dictate the operation of railroads what the requirements are.

Q And is there a—do experts in your field generally rely on such items as the federal register where these things are printed initially?

A The federal register is where the laws are printed and made available to the public, yes. I've read it from that source.

Q Do you rely on FRA reports and studies?

MR. GIBSON: Your Honor, she's leading the witness.

Q (By Ms. O'Dwyer) I'm trying not to get you to tell what you use, but tell me what you rely on that is provided to you from other experts that help you to know that this was how loud it is and whether it can be heard or not.

A I've reviewed the literature that's been published on this subject, a number of different authors, some of which I personally know that have [106] done work in this area. I've discussed the subject with them. It's all consistent with what I'm telling you in the Aurelius.

Q What was the year that the Aurelius report was first published?

A 1971.

Q What about Hopkins and Newfell?

A About '75 as I recall.

Q Have there been any statements by the Federal Railroad Administration that are published as to whether or not the horn is a sufficient primary warning?

A Yes. This has been a most discussed issue. The National Transportation Safety Board of 1990 issued a finding or recommendation—

MR. GIBSON: Objection, Your Honor, hearsay.

THE COURT: Yes, sir. He can use that as a part of his opinion without telling us what that result was. Sustained. That is hearsay.

MS. O'DWYER: He's allowed to tell you what he relied on about the report. I'm not sure I understand.

THE COURT: To the extent that it affected his opinion, he can give the opinion, his [107] opinion. But he does not need to tell us what the survey or the results of the study were because that is hearsay.

MS. O'DWYER: He can tell us the source of the study?

THE COURT: Yes, he can.

A The source of the study was mentioned in the National Transportation Safety Board. They had recommendations about this subject.

MR. GIBSON: Object.

THE COURT: He didn't say it.

A And I took them into consideration in making this opinion that I'm offering today.

Q (By Ms. O'Dwyer) Did you consider in your opinion any department of transportation or code of federal regulations that affect whether or not the railroad is allowed to make the horn any louder and the reasons that they're not allowed to make the horn louder?

A I am familiar with the American Association of Railroads, the regulations to the railroad industry recommending that they keep the standard and—

MR. GIBSON: Objection, Your Honor, hearsay.

[108] THE COURT: Yes, sir, that may be hearsay, but I don't think that's being offered to prove the truth of the matter, only that that's what he relied upon in forming his opinion.

THE WITNESS: It's just another source.

THE COURT: Yes, sir. I'm ruling in your favor. He can answer that question.

THE WITNESS: Thank you, sir.

A It's just a source that I have reviewed and taken the position that I do in this matter on sound that comes from that source of the railroad industry itself.

Q (By Ms. O'Dwyer) You talked about the—now, the manual on uniform traffic control device, can you tell us—I think you told us. Can you tell me how that is connected with the work of the FRA, the AAR, or any of the other regulatory bodies?

A Certainly. The national committee that I mentioned sponsored by a number of agents is who appoint members to the committee that are advisors to the committee appointed by the Federal Highway—excuse me, the department of transportation. They have representatives from the Federal Rail Administration and the Federal Highway Administration [109] that kind of sit in on the deliberations and add in their two cents worth.

The actual deliberations on what material is going to go into the manual, such as part 8 dealing with the rail crossings comes from a group of people who 50 percent are from the discipline of the highway environment and 50 percent from the discipline of the rail environment. And they come together and discuss the specific issues about the material in the manual, things that become known in the industry with respect to the principles that

are used to promote safety at rail crossings. And this participation by members from those two communities assure that the end result comes back to those that have the joint responsibility, the highway and the rail authorities, and that they have a voice in making the rules to regulations as well as a voice in caring about them.

Q Now, within those—without saying that it is a standard or that any law requires it of the railroad, is there a suggested warning time?

A Yes.

Q Does that apply to both passive crossings like Mr. Shanklin encountered?

A Well, there's a principle involved in that, and there's an accomplishment of safety that's called [110] the 20-second rule. And the intent is that—

MR. GIBSON: Your Honor, I have an objection to this witness talking about the intent of a rule. He can say what the rule is if it's otherwise admissible, but to go beyond that and say what the intent is is speculation.

THE COURT: Well, it's hard to know what the intent of something is created by a committee or a group. But you can tell us what the rule is and tell us what the effect of the rule is, what it does or doesn't do.

A Basically to give 20 seconds' opportunity for the motorist to understand that the train is coming. If you can't see it or hear it, that's done through a mechanical means like bells, lights, or gates or flagging. If you can see it or hear it, then the idea is going to have adequate time for that to be absorbed and to make a decision. That's why the horn, for example, is sounded a quarter of a mile from the crossing because under most operated speeds that gives a sufficient times of 20 seconds before the train arrives.

Q (By Ms. O'Dwyer) Let me just ask you, sir, to be on the safe side so we can keep the record correct, I

believe you did refer to the—you held [111] your dB readings, and I'm going to put an example of that and offer it as Exhibit 34.

MR. GIBSON: Let me see that. I still object to that, but you ruled against it. That's Plaintiff's Exhibit 34. I object to that, and I also object to 35. And I don't know whether you ruled on this one or not. I haven't seen that before. What is that?

MR. O'DWYER: I thought he spoke from it, but I noticed I had it in my hand, so let me let you go back and take a look at that one.

A I explained to the jury earlier that the decibel level reduced six decibels for double the distance. This is just a graph of a chart that shows you distance so that you can read 1500 feet from the crossing what the decibel level would be without having to do all that arithmetic, and it doesn't apply to anything except the standards of how the horn degrades as a function of time.

I might add that that's the reason that people in different environments can hear a horn and others can't. Sometimes a man that is out with a fishing pole on a pond in a quiet environment can hear the train miles away, but someone at the same location enclosed in a vehicle that has a high noise level—[112] let's say a tractor trailer, the decibel levels inside a cab of a tractor trailer can go over 100. He doesn't have a chance of hearing the horn because he's already involved in a sound environment that's higher than the noise that is going to be projected from the horn.

Q (By Ms. O'Dwyer) Going back to the original study in 1991, in that study was there a—did you rely on that study—

MR. GIBSON: Your Honor, I object to her leading the witness.

THE COURT: Yes, sir, but I think the reason she was leading was to avoid another objection.

MS. O'DWYER: I was trying.

Q (By Ms. O'Dwyer) In the Aurelius study—did you rely on the Aurelius study?

A I did.

Q Is that study customarily relied on by experts in your field to determine these safety issues as to what type of warning needs to be provided?

A I think that's fair if it's a legitimate publication and study, and certainly the Aurelius is.

Q And does that study—did it support your [113] opinion both as to what you've just described about the inadequacy of the horn?

A Yes, it does.

Q What about the head lamp? Did it talk about the head lamp?

A That's also discussed there.

Q You've talked to us about the Code of Federal Regulations' definition of what the horn is designed for. Can you tell us about the head lamp?

A Well, it also has some stipulations about how bright it should be, 200,000—I always get this terminology mixed up—candelas, I think.

Q And how many number of feet?

A That's going to be projected at 800 feet in front of the engine.

Q Do you sometimes refer to them and say the wrong number of candelas?

A I have been known to.

Q But regardless of that recognizing that that is the brightness of it, what was it designed to do according to the regulation?

A I want to clarify what I just said. I didn't want to misstate things like turning them around backwards, 800 feet versus 200,000 candelas turning them around.

[114] MR. GIBSON: Your Honor, I need to interpose an objection here. I don't know that this witness has been qualified as being able to state what the regulation is designed to do. He's told us what the regulation is, but what he knows about the design intent of the regulation has not been established, and I object.

THE COURT: Same ruling as before. He can state what the regulation is, but the effect of that regulation seems to be the same thing as it was designed to do.

Q (By Ms. O'Dwyer) In the course of engineering and traffic engineering do you take into consideration what something is designed to do?

A Certainly.

Q And did you take into consideration that this particular head lamp regulation tells you what it's designed to do?

A Yes, and even more than that. I've conducted studies with other parties to validate the effects of lighting particularly in nighttime environment. That's what you led me to the conclusion that I offered to you earlier that when you've got an illuminated source off into the horizon, it's very easy to overlook when you go through and look that [115] way and see a third point source there and not appreciate it because particularly the further off it is, the slower moving it appears and appears almost stationary, so you can get deceived with the first glance to think, hey, nothing is different when, in effect, it is quite different if that point source is on the front of a locomotive that's barreling down on you 40 miles an hour.

Q Do you know what the regulation says that the light is designed to do? Can you tell us what it's designed to do?

A Basically it was designed to illuminate the tracks so the crew could know there weren't any deer or cows or anything on the tracks and that things were clear. It's not

designed to be a warning device for the public to pick up on. There are other things that have been added to the equipment now since then to do that.

MR. GIBSON: Objection, Your Honor.

THE COURT: That's—

MR. GIBSON: We've already gone into this.

THE COURT: Yes. I'm ruling in your favor. Don't go into those things.

A The light itself is to give indication of the [116] illumination in front of the train as opposed to being a warning to the traffic that here comes the train.

Q (By Ms. O'Dwyer) In your analysis of Mr. Shanklin's ability to perceive his own danger or to see the train, did you also consider the—

MS. O'DWYER: What I'd like to offer into evidence and offer to you, Mr. Gibson, for your sake, these are Exhibits 21, 22, and 23. These are where the crew marked on the—these are from the crew's depositions where they marked their first abiilty to see Mr. Shanklin.

MR. GIBSON: I've got a problem.

THE COURT: Well, Let's talk about that over here.

(The following proceedings were had at the bench by Court and counsel out of the hearing of the jury:)

THE COURT: What's the basis of the objection?

MR. GIBSON: Your Honor, I went through this Rule 26 disclosure, and the deposition this witness gives me indicates no notice that he would be asked to tell this jury what was available to the railroad that put them on notice. That was * * *

* * * *

[146] day of this accident? I believe fourteen was the train count that day, and did you say that nine was the FRA number?

A I don't remember that. I remember all those sources, and I settled on fourteen trains a day, and that's

the criteria I looked up in the FRA book to see how busy a crossing this was. I recall I found only thirteen percent of the crossings had more than fourteen trains a day.

Q And did you use the timetables to verify the speed?

A Yes. I validated it was a class 4 track.

Q Did you use the accident report of the death of Eddie Shanklin to validate the allowable speed of the—

A Speed limit of 55 miles an hour.

MS. O'DWYER: I believe we also had—we could offer this in admission by the defendant that this was a class 4 track allowed at 60; is that all right?

MR. GIBSON: Stipulated.

Q (By Ms. O'Dwyer) Now, are those the components that you relied on to determine that you had, what would be called, high speed trains?

A High speed trains, high volume trains.

* * * *

[41] THE WITNESS: May I step down?

THE COURT: Yes. Be sure to keep your voice up when you're away from the microphone.

THE WITNESS: Yes, sir.

A I had commented yesterday that the right of way for the railroad would encompass this greenery. I pointed to it, but I didn't mark it. I just want to show you—this little solid line here is the limit of an embarkment—the difference in elevation between the roadbed of the railroad of the railroad and the level of the greenery and grass that's beside there.

The railroad owns 100 feet of right of way, and that can be measured from the center of the rail, 50 feet on either side, which falls at a point that I will mark here merely to illustrate that much of the greenery that's shown on this drawing is actually on the railroad right of way. I'll draw a black line [42] here and mark it as the right of way. You can know that any of this greenery that's

shown right on top of the embarkment is on the railroad right of way. This greenery through here, even part of that tree, all of this tree, and partially this tree is actually encroaching on the railroad right of way. And, of course, that's part of the sight obstruction that I've referred to, and that's a correctable thing because it could be eliminated.

Q (By Ms. O'Dwyer) Mr. Burnham, you were—in noting this visibility problem or this vegetation problem, let me ask you, sir, if I can point you to the Tennessee statute that directs—and, again, you might rather come down—that directs what the driver—the duty of the driver as he approaches the crossing, and, if you could, sir, show us how visibility plays into it and into the—

MR. GIBSON: Your Honor, is the witness being asked to give a legal opinion on how to interpret the statute? If so, he couldn't testify. He's not qualified.

THE COURT: I agree. I'll tell the jury what the law is. Just ask this witness what the facts are, and I will tell them later what the law is.

[43] Q (By Ms. O'Dwyer) Recognizing—let me just ask you, did you rely in forming your opinion on what Mr. Shanklin was required to do at this crossing?

A Yes. I needed to become familiar with the requirements of the motorist.

Q And what of his requirements did you consider in determining whether or not the railroad was—in your opinion that there was causation?

MR. GIBSON: I object to the witness drawing a legal conclusion.

THE COURT: Hold on. I'm going to let you ask that question. This is not asking for a legal conclusion but a factual opinion. You can answer that question.

A Yes. The two essential elements that I evaluated in the degree of hazardousness here dealt with sight and sound, and both of those elements are contained in the

actual instructions under the law which I could point out to you here.

Q (By Ms. O'Dwyer) I would like for you to just circue those in red.

THE WITNESS: May I step down, Your Honor?

THE COURT: Yes, sir.

A (Witness is marking.) The first thing I [44] circled here is a little phrase in the law that says the train must be plainly visible and in hazardous proximity, and, of course, those are the language—key words in the language of the law that alert the motorist that he has an obligation to look for a train that's plainly visible and in hazardous proximity. And that's difficult at this particular location because of the things I've talked about, the limitations of visibility, the limitations that are placed by the greenery and the nighttime and things we discussed on Monday.

There's another portion of the law that says that it must emit a signal that is audible, and I also discussed with you on Monday that there are certain limitations to be able to hear the horn under certain conditions as it's blown in proximity to where the train is to where the motorist is and what its noise level is around that particular location. This merely just confirms that the two key elements of determining ultrahazardousness at a crossing are tied into the ability of the motorist to visibly see and audibly hear the approaching train, and those are the limitations that exist at this location.

* * * *

[54] Q (By Mr. Gibson) Where in the oversight committee minutes do you find the statement that the 96 decibel level is an industry standard?

MS. O'DWYER: May I pass that exhibit to the witness?

THE COURT: Let's, first of all, see if he needs an exhibit.

A I have it underlined in the review of those oversight committee notes that I have reviewed, but the audibility standard is a part of those minutes, and it's as such.

Q Standard or minimum?

A Minimum. I agree, minimum. I don't argue with that.

Q I'm trying to get an agreement between you and me. The 96 dB is the minimum; you have to have a horn at least that loud to comply with federal law?

A Yes. I think it's a plus or minus four decibel tolerance on the minimum.

Q And many railroads you know do have horns that are considerably louder than 96 dB; do you not?

A They have been tested on isolated incidents [55] to that effect, yes, sir. The only one that I know has been adopted for standard use is on an Amtrak train which use 115 decibels. But standard freight trains in all the other companies are at the 96 decibel level.

Q By what information they're all at 96? How do you know they're all at 96?

A I need to clarify. I'm not talking about testing at exactly 96 decibels because there is a tolerance in there of four decibels. But the industry has adopted the use of the horn in the 96 decibel area because mainly of the concern from the locomotive engineer about deafness and other problems of concern, complaint from the public of being too loud. 96 is the standard decibel level that's used on all other trains but Amtrak.

Q Now, Mr. Burnham, that's the minimum level; is it not?

A The minimum level, and the minimum level is what is used.

Q And the fact is that many horns or many locomotive freights—not Amtrak but many locomotive freight engines are higher than 96 decibels?

A They may test higher, but in my experience it's always been within that plus or minus four [56] decibels.

Q How many locomotive units have you tested with the sound meter?

A I haven't tested any personally, but I have read many tests that have been conducted.

Q And you certainly didn't test the locomotive involved in this accident personally?

A No, I did not.

Q When you were doing the sound meter testing at the scene of this accident, the locomotive wasn't present; is that correct?

A That's true.

Q You used a sound meter to measure the decibel reading you did take; is that correct?

A That's correct.

Q I believe they're shown on Plaintiff's Exhibit 34. These are the measurements you did take; that is, the one that says no activity and then inside vehicle, and then you made an estimate here; did you not?

A Yes, sir. That's the ones I had made and had estimated.

Q Now, did you use any other sound measurement device other than the sound meter in making these?

A No, sir.

[57] Q You did not use a calibrator?

A Correct, only a sound meter.

Q Do you recall what scale you used?

A Yes, sir. I had explicit directions about that. I'm sure I don't remember the nomenclature right now. I believe it was the C scale.

Q You used the C scale, and you did not have a calibrator in advance of these tests?

A No, sir. The instrument is automatically calibrated in the testing that is done before you activate the meter. It has a little area that shows you it is self-calibrated if it's within that area before you ever use the meter.

Q You did not use a separate calibrator?

A That's correct.

Q And you put it on the C scale?

A That's my memory.

Q I now want to ask you some questions about the visibility part of your testimony.

A Yes, sir.

Q I think you and I are in agreement, the standard that applies to crossing warning devices is the uniform—the manual on uniform traffic control devices; is that not correct?

[58] A That is a standard, yes, sir.

Q Well, it's the one that's adopted by the United States Secretary of Transportation for the railway and highway safety and highway safety in general; is that not correct?

A And by the State of Tennessee.

Q And the State of Georgia?

A Correct.

Q So it has the force of regulation in the State of Tennessee?

A Yes, sir.

Q Now, that standard provides, does it not, that traffic control devices shall be placed only by the authority of a public body; isn't that correct?

A That generally the devices are placed by a public body, yes. It depends on who owns the property. If it was placed on a city street, the city government, county, or county government—

Q But that's a public body.

A The state would be the state body, and the railroad would be a private body.

Q But it doesn't say anything about private bodies in the standard; does it? It says traffic control devices shall be placed only by the authority of a public body. [59] A It's speaking of those approaching the crossing, that's correct.

Q And with respect to the part of the standard, that is, the uniform manual that regulates the railroad warning devices, that's part 8; is it not?

A Yes, sir.

Q It provides that the determination of need and selection of devices of the grade crossing is made by the public agency; is that correct?

A Yes, sir.

Q In this case it would be the Tennessee Department of Transportation; would it not?

A That's correct.

Q Now, there is nothing in the standard, that is, the uniform manual that specifies the amount of advanced warning a motorist should be given when he or she approaches a crossing with just crossbucks; is there? There's nothing—

A The amount of visibility warning?

Q Or any kind of a warning. It doesn't specify; does it?

A Well, the manual specifies distances that are established for erecting the advanced warning signs and the pavement markings, yes.

Q The advanced warning sign in this case at the [60] Oakwood crossing complied with that requirement; did it not?

A Technically it may not have, but I think essentially it complied if it was present. It may not have been at the

exact position that it was so stipulated for the speed of the approach.

Q Let me hand you an exhibit which has been marked Defendant's Exhibit No. 1. Can you see from that angle? If not, could the witness—well, that's fine. Take a look at it. Do you recognize that to be the Oakwood crossing and the approach that Mr. Shanklin took to the crossing?

A Yes, sir, I do.

Q And what you mean by advanced warning sign; is that that circle sign there on the right?

A Yes, sir. That's the advanced warning sign.

Q And does that appear to be in compliance with the uniform manual?

A It does.

Q Is there any other advanced warning that you're aware of that is within the manual that would apply to this crossing?

A Yes, sir.

* * * *

[66] Q According to this document there has never been an accident at this crossing before Mr. Shanklin's accident that involved a personal injury; isn't that correct?

A There was one previous accident, but I don't believe there was an injury sustained; that's correct.

Q This document says that nobody was hurt, does it not, no injuries, zero?

A 1988 document, yes, that's right.

Q So my question—the answer to my question is—I mean, the response to my question is, yes, there have been no personal injuries according to the accident history at this crossing until Mr. Shanklin's injury; is that correct?

A That's correct.

Q Now, this other accident that you said, there was one in 1988, is that not right, where there were no injuries?

A Yes, sir.

* * * *

[68] Q So the car is going the opposite direction, and the train is going the opposite direction?

A Yes.

Q So as far as the accident history then shows at this crossing there has never been any accident with or without an injury at this crossing before Mr. Shanklin's accident involving a vehicle going in the same direction Mr. Shanklin was going; is that right?

A That's correct. I have no record of that.

Q Now, let me show you a few more photographs. Defendant's Exhibit No. 4, Mr. Burnham, can you tell—does that appear to be the same crossing—I know you haven't got as much perspective, and you may not be able to identify because I know you weren't there until long after the accident the first time. Are you able to identify that or not?

A Yes, sir.

Q Is that the Oakwood crossing or at least a shot from the road—

A I believe it is. This building had been removed when I attended the location.

* * * *

[73] Q And traveling at 20 miles per hour Mr. Shanklin was traveling at approximately 30 feet per second?

A Yes, sir.

Q 30 feet per second, so his reaction time gives you your number. Would it be 75 feet embankment?

A Yes, sir.

Q Now, if I understand your testimony on Monday, your reaction time of 2.5 seconds is based upon the reac-

tion time of a driver encountering an unexpected event; is that right?

A That's the design criteria, yes.

Q And I also understand from your testimony and this chart—it's not apparent on the chart, but you've testified as to Plaintiff's Exhibit 2 that Mr. Shanklin could have seen the train when he was 94 feet from the crossing; is that right?

A Yes, sir. If you will remember, my computer module tied down exactly where the train and the vehicle were with respect to each other.

Q Mr. Burnham, isn't that crossbuck sign at the crossing the equivalent of a yield sign?

A Not in my judgment, no, sir.

[80] Q When you were with the Georgia DOT, was it—if the railroad had come to you and told you they wanted to spend their own money, not even ask for state money, would they have gotten approval of the type?

A Certainly. The state will accept candidates that are not on their priority list if they're paid for with other funds than what the state has to pay.

Q The previous accident in 1988 on October 2nd, I believe, just almost on the anniversary date of this accident, does that—the fact of that accident, whether it happened in exactly the same way, have any effect on your opinion as to whether or not Norfolk Southern was aware they had a problem with the crossing?

A Yes, it does.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF WILLIAM CANTRELL AND NELSON CHRISTIANSON

* * * *

[65] A [Mr. Cantrell] I am currently a Transportation Manager 1 and employed in the—now, in the rail and waterway division.

Q [Mr. Gibson] What are your duties, in very general terms?

A I act as secretary of the Tennessee's diagnostic team for railroad and highway grade crossings.

Q Has the Tennessee Department of Transportation volunteered to participate in the federal rail-highway crossing safety program?

A They have.

Q How many federal aid programs do you personally administer?

A I'm in charge of the minimum protection program and the hazard priority listing.

Q All right, you've given me two programs. One you called minimum protection; is that right?

A Yes.

Q And the other you called a priority program; is that right?

A That's correct.

Q Do you administer any other railroad grade crossing safety programs that are not sponsored by the federal government?

A Fatality program.

Q And very briefly, what is that?

A Under Section 65-11-113 and 65-11-114 of the [66] Tennessee Code Annotated, any crossing that experiences a fatality within a six-month period, if it has one hundred traffic count, regularly scheduled trains, regularly scheduled school buses, then the department will start a project to go to active warning devices—that is, lights or lights and/or gates—at that crossing.

Q I want to you ask you a few more questions about the priority program, which is federally sponsored; is that right?

A Yes.

Q How is priority determined at a particular crossing in the state of Tennessee?

A Several years ago—well, the—with the 1973 Highway Transportation Bill—or, actually, '72—they decided that they would have this program. And they include several different types of formulas. And, finally, the FRA, in conjunction with—or the Federal Railroad Administration. I'll try to remember not to talk in—

Q Lingo?

A —lingo here. —and the American Association of Railroads, I believe, if I'm not incorrect, hired a bunch of MIT boys to come up with a formula to predict accidents at railroad crossings.

Q The formula, then, predicts whether an accident is likely at a particular crossing, or is that—is that—

[67] A That's correct.

Q What factors does your department consider to determine relative degree of hazard at crossings using this formula?

A In the formula, not only—it takes into consideration the type of protection there, the year the protection was implemented—

Q What's already there?

A Yes.—the train—number of trains a day. Number of day through trains. The amount of the traffic. The percent of trucks. The function class of the road, what type it is. How many lanes of traffic. Whether it's paved or not paved. In all, with—currently, there are 3,459 crossings, we think, at this time, public crossings.

Q In Tennessee?

A In Tennessee. And all told, taking in consideration the number of factors, you're looking at fifty-thousand-plus factors involved in this computer program.

Q How about crossing accident history? Is that also a factor?

A Yes. I'm sorry. I failed to mention that.

Q But does the computer calculation of relative degree of hazard include sight distance?

A No, it does not.

[68] Q Is every one of these 3,425—or fifty-nine public crossings in Tennessee evaluated by—

A Yes; by the computer.

Q And how frequently?

A Yearly.

Q What do you do when a crossing reaches priority; that is to say, its hazard ranks far enough, high enough, to be treated on a priority basis?

A First of all, we determine—we verify the information that, more or less, kicked it out—you know, that brought it to our attention—and verify every traffic count; every percent of trucks and so forth. As a general rule, it's most accurate; but occasionally we do get a bug. You know, the computer will throw a number or something like that. But as a general rule, they're right on the money.

And then I had formed a diagnostic team of various engineers, and—

Q Highway engineers?

A Highway engineers; that is, with the Tennessee Department of Transportation. And I even had, for the last few years, a representative from the Federal Highway Administration that was an engineer with them on my team.

Q And would the diagnostic team actually go to the particular crossing?

[69] A Yes, they would.

Q Do you diagnostic teams always recommend that automatic signals be installed when you go to a particular crossing?

A No, they don't.

Q What is the standard adopted by the Tennessee Department of Transportation for traffic warning devices?

A The department has devised the Manual on Uniform Traffic Control Devices, otherwise known as the MUTCD.

Q And are reflectorized crossbuck signs warning devices that are permitted by that manual?

A Yes, they are, under a certain design and specifications.

Q Is there a confidentiality statute under federal law that prohibits you from giving data on a particular crossing? Like in this case we're considering the Oakwood crossing in Gibson County, Tennessee.

A Yes. Under U. S. Code 409, there are certain things that are not available for depositions or disclosure of any sort.

Q Even in court?

A Even in court.

Q And are you—because of that statute, are you able to tell this jury how Oakwood Road crossing ranks on the hazard index?

[70] A No, I'm not. My efforts are to remain unbiased, just like this judge and this jury.

Q Are you able even to tell the jury whether or not you've ever taken a diagnostic team to the Oakwood Road crossing?

A No, I can't say that.

Q Because of the confidentiality statute?

A Yes, that's true.

Q Now, let's skip to the next federally-backed program, and I believe you called that the minimum protection program; is that correct?

A Yes, that's the name we put on it.

Q Now, once you do some work at a particular crossing, then you can tell us what you did; is that right?

A Well—

Q In spite of this confidentiality statute, once you do some work, you can then tell a lawyer, the jury, the judge what was done at a particular crossing; is that right?

A Yes. Yes.

Q And did the minimum protection program include the Oakwood Road crossing?

A Yes, it did.

Q Describe, briefly, what the minimum protection program consists of.

A Under the minimum protection program—Under the—[71] US 130—Section 130(d), we were to put, at a minimum protection, a sign protection at crossings.

Q In compliance with the uniform manual?

A Yes. Well, no. That was part of the original statute.

Q Okay.

A Someone determined—apparently, prior to my arrival into the program—that Tennessee would put, at a minimum—hence, the name—two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would

take it. Obviously, we wouldn't put advanced pavement markings on a gravel road.

Q Now, if—

A Or—Go ahead.

Q Were any employees of the department sent to various crossings to see what needed to be put there?

A Yes, there were.

Q And do you have a record of what work was actually performed at these various crossings?

A Yes, we do.

Q I hand you a document that's been marked defendant's exhibit 18. Can you identify that document for us.

A This is page 2C from a federal project, RRO-OOOS parentheses 347, parentheses closed.

[72] Q RRO-OOOS—

A Parentheses 347, parentheses closed.

Q All right. And is Oakwood Road included in that project?

A Yes, it is.

Q Can you tell from defendant's exhibit 18 what was done at Oakwood Road crossing as a part of this minimum protection program?

A At location code A, which was Oakwood Church Road, according to this, we actually went out there and removed two crossbucks; apparently, because they were substandard or perhaps the deer hunters had used them for targets. I'm not sure why, but—and replaced them with two reflectorized crossbucks.

We installed what they call a W10-1 sign on one approach and then two W10-2 signs on State Route 43.

Q I now hand you a document marked defendant's exhibit 19. Is that—does that appear to be a page or maybe a portion of a page from the uniform manual

describing the advanced warning devices you just related to the jury?

A Yes. There's a—W10-1 is a 36-inch-diameter sign. And there's a W10-2 on the same sheet that's 30 inches by 30 inches square.

Q Now, here's a photograph of the crossing taken some distance back. It's been marked defendant's exhibit number [73] 1. Do you see a circle in that photograph?

A Yes. That's the W10-1.

Q Is that in compliance with the uniform manual—does that appear to be?

A Yes.

Q I don't know whether you can see all you need to see or not, these crossbuck signs themselves, but I'll hand you defendant's exhibits 3, 4 and 5 and ask you to see if you can tell, just with the naked eye, from those photographs whether those crossbuck warning signs at the crossing appear to be in compliance with the uniform manual?

A Well, actually, I can't tell, you know. You would—

Q Look at the other crossing—

A They appear to be. But, I mean, to actually tell whether or not they're diamond-sheeted, 3M quality, you would have to be within about four or five feet of them.

Q But your intention was to comply, is that correct—

A Yes.

Q —with the minimum protection program?

And what does that diamond sheathing and all that other stuff you just described do for the crossbuck to help warn motorists?

MS. O'DWYER: Your Honor, since he testified he can't say what's up there, I object to him saying what it's intended to do.

* * * *

[78] BY MS. O'DWYER:

Q Mr. Cantrell, have you ever just driven by the Oakwood Road crossing? Have you ever driven by the Oakwood Road crossing, going to it just casually for any purpose at all?

THE COURT: Unrelated to your work.

A Not to my knowledge.

BY MS. O'DWYER:

Q And other than being shown this picture, have you ever seen the crossbucks to know whether they have any particular—you know, any 3M product or whatever? I'm talking about the ones at this crossing. Are you even the person—

A Yes. I suppose—I mean, if I'm going to answer that, then, yes, when we did our fatality investigation, they were in compliance.

Q All right. Now, this minimum protection program and the fatality program—I'm sorry, the priority program and the fatality program, they're not in any way connected with the minimum protection program other than being administered by your office?

A That's correct.

Q Okay. Is there any engineering judgment that was used—I think you described this team of people on the minimum protection program that were from somewhere else [79] that gave up some standards and said—or made up some standards and said this is what you need as minimums at crossings. Was there any actual engineering judgment done by anyone under your control in the state of Tennessee that looked at this crossing and said minimum protection will be enough; it's adequate?

A No. See, the decision—we came in—the program had already been started, and they had already done state

routes and stuff like that. Someone up above us had made the decision, and we went by policy. In other words, it's a recipe type thing. And the people that actually went out to do the signing were design engineers with no railroad experience. So it was just—the decisions of what to put out there and so forth were done at a higher level.

Q I believe you used the phrase with me before, "sort of monkey see, monkey do"?

A I'd rather not use something—Recipe would be more like, you know—Making sure that everything has some sort of protection.

Q And, also, have you—was this made necessary because the railroad, as part of one of the entities that had responsibility for this crossing, had, as I believe—

MR. GIBSON: Objection, Your Honor. I don't understand the question. Was what made necessary?

MS. O'DWYER: The minimum protection, the [80] mop-up.

BY MS. O'DWYER:

Q Didn't you call this at one time, Mr. Cantrell, a mop-up detail?

A It was a mop-up in the fact that we were getting the last of what was left. In other words, like I said, somebody had done state routes already. Somebody else had done federal—in fact, we came in on the end of the federal aid urban. So we were doing the mop-up or the last of the program that was already in the works.

Q And what I was asking you about was, didn't you tell me that this was made necessary because the railroad, as one of the entities that had responsibility for this crossing, had dropped the ball?

MR. GIBSON: I object, Your Honor. That's not a proper question, as to what the railroad did or—that's—This witness is not qualified to comment on that.

THE COURT: Well, let's have another sidebar.

(Bench conference. Ms. Steele present)

* * * *

[85] Q In this particular mop-up detail, what was the role of the federal government? And I mean very specifically. Would you be able to say—Would it be fair to say that they merely funded, funneled and signed off on this project?

A Funded—

Q —funneled and signed off.

A Ran it through the thing? It's not a major project, by any means. I mean, we would spend millions on a bridge, and you can go out and—at one of these crossings that we see made a Cadillac and you've only spent two thousand dollars in signing.

Q You're talking about under the minimum protection program?

A Yes. Thank you. I'm sorry about that.

Q Would you say that the expenditure at the Oakwood crossing would be considered insignificant by comparison?

A Insignificant to some of our—yes. Some of our [86] roadway projects? Yes. I mean, you know, supposedly, they have somebody that picks out a few locations. This one involved 196 locations, so, obviously, they don't visit every one of them, like our team did. But more than likely, they did a random check on it and signed it.

Q Now, we've talked a little bit about some law that's in effect now that doesn't let you talk about whatever is—you know, is going on out there or has been done out there. But back in 1988, before this became fashionable to exclude this, were your files open to the public and to the railroads?

A I'm not sure when that came into play.

Q But at least prior to—

A Somewhere along in there, I believe.

Q Let's go back to like, say, 1991. Prior to 1991, wasn't it your practice to—say, for instance, if Mr. Gibson wanted to come up or some lawyer for the railroad wanted to come up, they could some up and talk to you freely without the state being there, go through your file and see what sort of—

MR. GIBSON: Without the state's attorney?

MS. O'DWYER: That's right.

THE COURT: I'm sorry, Mr. Gibson? I hear lawyers better when they're standing.

* * * *

[91] MS. O'DWYER: I would like to offer this as a—if it's held out. I'd like to offer it.

THE COURT: Mark that as an offer of proof, the next offer of proof. The objection is sustained, but make it a part of the record.

(Bench conference concluded)

BY MS. O'DWYER:

Q I have just one last question, Mr. Cantrell. If the railroad had come to you and offered you a plan telling you—and you don't have to study that, but I'm just showing you as an example of the type of plan that the railroad might have offered. If they had contacted the state and offered a plan that showed that they were going to put up lights, bells, gates, whatever they deemed to be adequate protection for this crossing, and they put in their request that they were going to pay for these signals themselves, and you could examine it and you could determine that the signals met what you deem to be in compliance with your manuals that you use. would the state have ever done anything but approve that by turn-

around [92] mail? After you studied it and determined that the type that they were offering to put up was in compliance?

A We would have taken that deal in a heartbeat.

Q Okay. All right.

MR. GIBSON: I have one question on redirect.

THE COURT: Yes, sir.

MR. GIBSON: I need to find an exhibit. Here it is.

REDIRECT EXAMINATION

BY MR. GIBSON:

Q You were asked about page 82 in the Railroad-Highway Grade Crossing Handbook, which is the sight distance or sight triangle exhibit. Excuse me just a second, Mr. Cantrell. I need it back.

A Yes, sir.

Q That's plaintiff's exhibti 23 in this record. Is that the page she referred you to? Does that appear to be the page?

A I suppose it is. It appears to be; yes.

Q All right. And have you seen that before, that page, page 82, with that sight distance triangle?

A I believe I have.

Q When you, as a member of—as a traffic engineer with the Tennessee Department of Transportation, and in conjunction with traffic engineers with the Federal Highway [93] Administration, go as a diagnostic team to these crossings, do you always follow the dictates of that exhibit?

A No, I don't.

MR. GIBSON: That's all.

(Witness excused. Jury admonished and excused for lunch at 11:45 a.m. Discussion off the record between the court and the clerk)

THE COURT: All right, Ms. O'Dwyer, you indicated you wanted to examine Mr. Cantrell while the jury is out. You may proceed.

MS. O'DWYER: Thank you, Your Honor.

FURTHER CROSS-EXAMINATION

BY MS. O'DWYER:

Q Mr. Cantrell, historically, in the time—or early eighties, did you have participation from the railroads in your diagnostic study of crossings, particularly the Oakwood crossing? Did you ever have participation from the railroad in that?

A The program was in terrible shape; and we, historically, did about three and a half million dollars a year, and it accumulated up to quite a pile under my predecessor. And we initially tried to include railroads in our diagnostic studies; but, by logistics, it became a nightmare.

* * * *

[97] Q Are you paid by the federal government?

A I'm paid by the state, unfortunately.

Q And do you—did I ask you earlier if this department of transportation has adopted the MUTCD as a standard?

A I believe you did.

Q Is there any level of protection lower than a crossbuck?

A We do have some crossings out there that have no protection. They are purposely hand-flagged. They are oddities, but we do have a few. And I consider them less.

Q And are you speaking—when you're speaking here today, or testifying, or even in your work, are you speaking for the secretary of transportation in any way?

A Pena? No. For the State of Tennessee, yes.

Q Are you making a federal decision?

A No.

THE COURT: Mr. Gibson, do you have any questions?

MR. GIBSON: No.

(Witness excused. Recess at 11:50 a.m. to 1:25 p.m. Jury in)

* * * *

[Jury Out]

[104] Q [Mr. Gibson] Let me hand these documents to you and ask if you can identify the—first, defendant's exhibit 20. Is that the authorization for the project?

A [Mr. Christianson] Yes, it is.

Q And that was approved by the Federal Highway Administration as well as your department; is that correct?

A It was approved by the Federal Highway Administration.

Q This is exhibit 21, defendant's exhibit 21. Is that the contract entered into between the Federal Highway Administration and the Tennessee Department of Transportation for this project?

A It's the federal aid project agreement.

Q And defendant's exhibit 22, is that a final acceptance report?

A It's a final inspection report.

Q Exhibit 23, is that a completion letter, and is it dated December 3, 1987?

A Yes, it is.

Q Defendant's exhibit 24, is this the—another final certification?

A It's the final acceptance of the project.

Q Defendant's exhibit 25, is that the voucher submitted for payment to the federal government?

[105] A Yes, it is.

Q And defendant's exhibit 26, does that document indicate that about 99 percent of the money spent on this project was, in fact, paid for by federal funds?

A Yes, it does.

MR. GIBSON: Your Honor, that's all I have.

I move the introduction of defendant's exhibits 20 through 26 as an offer of proof.

THE COURT: All right, those are admitted for an offer of proof only.

Ms. O'Dwyer, do you want to cross-examine for the offer of proof?

MS. O'DWYER: Yes, sir, I do.

CROSS-EXAMINATION

Q Mr. Christianson, the funding for that project, do you actually handle the transmission of the check itself?

A No, I do not.

Q And do you know whether or not these—the actual check from the government that comes into—comes into a fund that is made up of other funds? Are there funds commingled from other sources to make up the funds you use with which to pay these projects?

A I don't know that I exactly understand your question or—You're talking about the federal funds?

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF JACK LANDERS

* * * *

[53] Q [Mr. Gibson] And do you have an estimate of the speed of the train as you approached this crossing?

A I guess approximately thirty-seven miles an hour.

Q Did you see the automobile involved in the accident before impact?

A Yes, sir, I did.

Q Where was the train—that is, the very front of the train—when you first saw the automobile?

A I'm guessing about a hundred to a hundred and fifty feet from the crossing.

Q Where was the automobile?

A Approximately fifty to sixty feet, in that range.

Q Could you determine the approximate speed of the automobile?

A I guess about—between fifteen and twenty-five miles per hour.

Q Could you tell whether or not the automobile was slowing as if to stop for the train?

A No, sir, it didn't appear to be.

Q When you realized that it was not slowing to stop for the train, what did you do?

A I hollered for Mr. McAnally to big hole the train, and I pulled the brake handle on my side.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF SCOTT PLUNK

* * * *

SCOTTY PLUNK, PLAINTIFF WITNESS,
WAS SWORN

DIRECT EXAMINATION

BY MS. O'DWYER:

Q Mr. Plunk, let me ask you, sir, whether or not you can recognize this affidavit. Do you have a copy of that?

A Yes, ma'am.

Q Do you have it? Is that something that you have in your hand?

A Yes, ma'am, I have it in my hand.

Q All right, you can recognize this. It's been marked as plaintiff's exhibit 37 for offer only as your affidavit [111] you gave in the case of Carl Richard Howard and wife, Linda Howard, parents and next of kin of Jennifer Howard, against Norfolk Southern Railroad Company. Let me ask you, sir, attached to that affidavit, if you have it there, is some copies of documents from Nelson Christianson's deposition which are marked—the Certification Acceptance Final Inspection Report is marked as exhibit 4 to that deposition; and, also, the Final Inspection of Federal Aid Project Constructed Under 23 USC 117 is marked as exhibit 6. Do you recognize your participation in those documents?

A Yes, ma'am.

Q Okay. Did you and Mr. Sellers—I believe Mr. Sellers has now left the employment of the state and gone to live in—do you know where?

A He was with the Federal Highway Administration.

Q That's right. Were you a state employee at the time these were made?

A That is correct.

Q And Mr. Sellers was, in fact, a federal employee?

A That is correct.

Q And do you recall whether or not you had ever—at the time these documents were executed, whether you had actually, quote, inspected or gone to the Oakwood Road crossing to look at the workmanship that was done there to see whether or not it gave adequate warning to the public?

[112] A I do not recall ever inspecting that crossing; no, ma'am.

Q Can you tell us—I take it that everything in your affidavit is truthfully stated?

A I think so.

Q Okay.

MS. O'DWYER: Your Honor, I believe I'll just rely on the affidavit itself and ask that that be accepted as the—

MR. GIBSON: May I see that? Hold on. Just let me check for one second to see if there's any hearsay that I want to raise, Your Honor.

I have no objection to the affidavit which is plaintiff's exhibit 37 as an offer of proof, Your Honor.

THE COURT: All right, mark that as a part of the offer of proof.

CROSS-EXAMINATION

BY MR. GIBSON:

Q Mr. Plunk, you do not purport to speak for the Federal Highway Administration in any regard; is that correct?

A No, sir, I do not.

Q You have some authority to speak for the state department of transportation but not for the Federal Highway Administration.

[113] A That is correct.

MR. GIBSON: That's all I have, Your Honor.

REDIRECT EXAMINATION

BY MS. O'DWYER:

Q Let me ask you this then, Mr. Plunk. At all times when you were doing the inspection of these 196 crossings, were you with Mr. Sellers during any time that you all would have been out doing any inspections?

A Yes.

Q Do you know if you made some random inspections of other crossings?

A The dates that we were inspecting, we did not inspect every crossing that was listed. We made random inspection of several crossings throughout the different counties to ensure that the contractor—I believe his name was—I believe it was C&D Safety. That they had fulfilled their contract of the installation of crossbucks, or whatever was the minimum set up on the plans. I can't recall everything at this time. And that's all we were doing, was to check to see that that contractor had fulfilled his contractual obligations.

Q You were not making an engineering study to say that they were adequate.

Was Mr. Sellers going to different crossings than you were?

[114] A No, ma'am. We were going to the same crossings. He was riding with me. We were not making any—All we was doing was inspecting the items that were listed in that contract for the contractor to do.

Q Would there have been any way physically possible for you and Mr. Sellers to have seen 196 crossings over eleven counties in the space of time that it took you? I think—It looks like you did this over a—from November 3rd to November 18th?

A It was random sampling. It was not—it was not every crossing that we inspected; no, ma'am.

Q You're from around here; correct?

A That is correct.

Q Do you think you would remember if you took Mr. Sellers to the Oakwood Road crossing?

A I don't recall—I don't recall going to it, and he would have been riding with me, so I do not feel at that time that we went to it.

Q Okay. Thank you, sir.

MR. GIBSON: Nothing further, Your Honor.

THE COURT: All right, sir, you may step down.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF TOM ROSE

* * * *

[47] A [Mr. Rose] The first segment, the one coming up, the first segment, is the sound in the car when the car is one hundred feet from the intersection with the engine running, being raced up to the speed that it would be running if it were traveling twenty miles an hour.

BY MR. GIBSON:

Q [Mr. Gibson] Where is the train?

A The train is two hundred feet down the track.

(An audio tape was played)

A Disregard what you're about to hear.

(An audio tape was played)

A The next recording you're going to hear is with the train moved—excuse me, the car moved back to two hundred feet from the intersection. The train is at four hundred feet. And the engine is off. Again, the car is at two hundred feet.

(One audio tape was played; then a second one was played)

BY MR. GIBSON:

Q Is this a disregard?

A No. Yeah, this is a disregard.

[48] (The second audio tape was then concluded)

A Okay, the next one coming up—I have a little egg on my face, as you heard. The next one coming up is at two hundred feet—the car is at two hundred feet, the same as before. The train is at four hundred feet, the same as before. But now the engine is running; and the recording, as you can tell, is terrible. It's extremely muddy. There was a malfunction, but I think you can still tell that the horn is—you can tell the horn is there sometimes and not there at others.

And this is to be listened to. The car is at two hundred feet; engine on.

(An audio tape was played)

A The next series will be the last, and disregard the next—the next batch that will you hear.

(An audio tape was played)

A Okay, the last tape segment. This you should listen to. The car is four hundred feet back from the intersection. The train is eight hundred feet from the intersection. The engine of the car is on. Again, the car is at four hundred feet.

(An audio tape was played)

A That concludes the tape portion. And please bear in mind that all of these were inside the car with the car windows closed.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF GLENN TAYLOR

* * * *

[117] Q [Mr. Gibson] Now, I'm going to hand you some photographs that have already been admitted into evidence in this case as plaintiff's exhibits 5, 6, 7, 8. Was there a photographer on the scene, a professional photographer?

A Yes, sir. I called for one.

Q And did you remain on the scene to conduct your investigation after it became daylight?

A Yes, sir.

Q Would you please look at those four photographs and tell me if they appear to be photographs taken at the accident scene while you were still making your investigation.

A Yes, sir, they are.

Q And do they fairly depict the conditions at the scene as observed by you?

A Yes, sir.

MR. GIBSON: I have no further questions, Your Honor.

* * * *

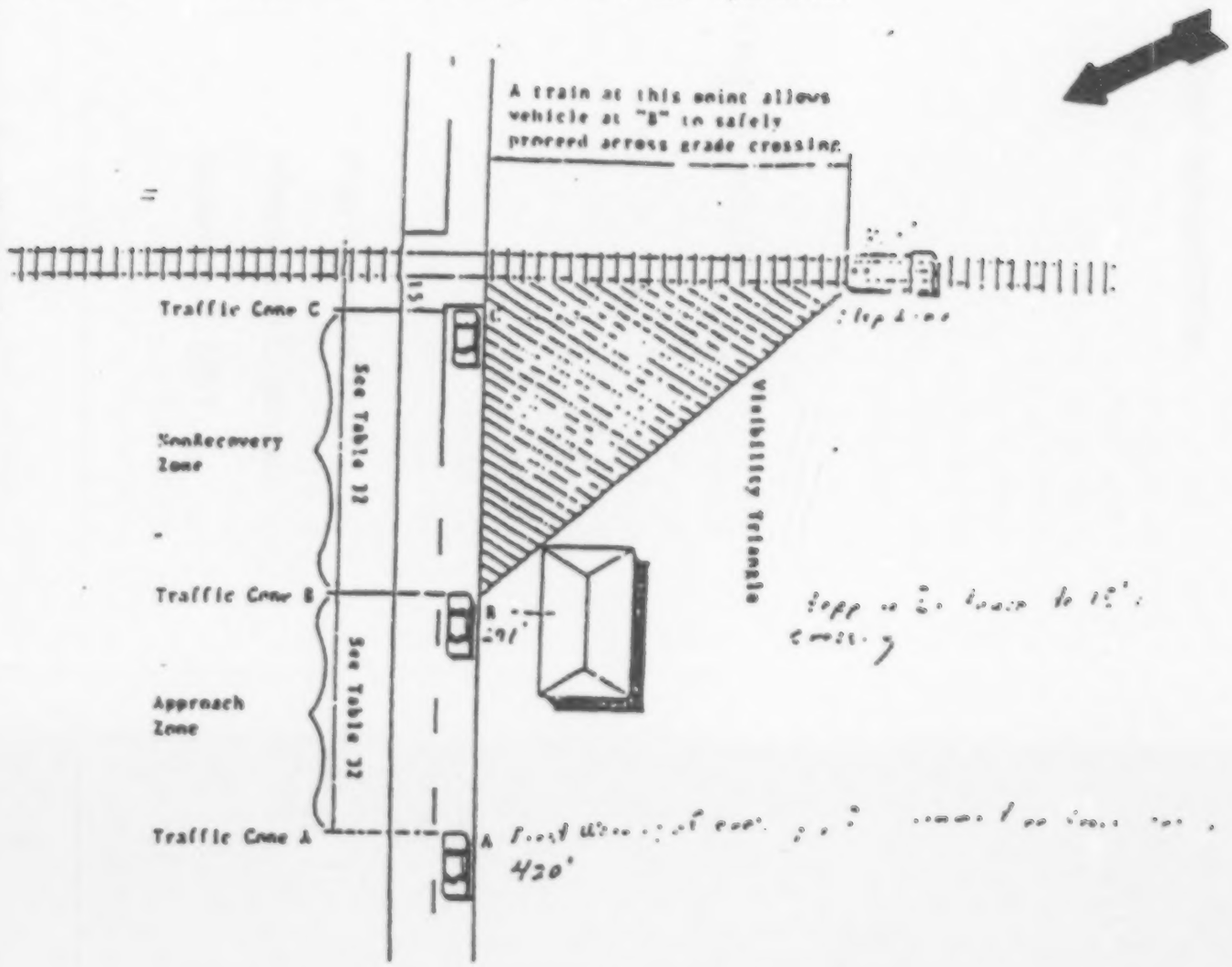


Figure 16. Study Positions for Diagnostic Team

Table 32. Distances to Establish Study Positions for Diagnostic Team Evaluation

Design Vehicle Speed (mph)	Distance from Stop Line[a] to Cone A (ft)	to Cone B (ft)
30	450 - 625	210
40	600 - 825	325
50	750 - 1025	475
55	875 - 1150	555
60	1000 - 1275	645
70	1100 - 1450	850

[a]The distance from the stop line is assumed to be 15 feet from nearest rail.

applicable to crossings with a high level of complexity.

Cone B is placed at the point where the driver must be able to see an approaching train so that a safe stop can be made if necessary. This point is located at the end of the approach zone and the beginning of the nonrecovery zone.

Distances to point B are based on the design vehicle speed and are shown in Table 32. These distances are stopping sight distances to the stop line (15 feet from the track) and are identical to the values in Table 36, Chapter IV (less the 15 feet). In calculating these dis-

EXHIBIT 23

BEST AVAILABLE COPY

123

GRADE CROSSING

OVERSIGHT COMMITTEE

[Graphic Omitted]

Presentation to

Management Committee

September 7, 1993

NS/NORFOLK SOUTHERN

Norfolk—October 8, 1993

* * * *

Enclosed is Norfolk Southern's new Corporate Policy on Highway/Railway Crossing Safety. We all know that many persons including NS employees, are injured or killed in grade crossing accidents. Grade crossing accidents are also a leading cause of damage to Norfolk Southern property and delay to NS trains. For the last several years, NS consistently has had the highest number of crossing accidents and the worst rate of such incidents among major railroads. This is not acceptable for NS.

We have established a corporate goal to make the NS crossing safety record the best in the industry. To achieve this goal, we must actively identify and correct crossing hazards on our lines. We also need to better coordinate our many existing crossing safety activities. Perhaps most important, we need to work with the states to insure maximum participation by NS in government funded signalization programs.

I have asked the system Grade Crossing Oversight Committee to implement the Corporate Policy and Jim McCloskey will serve as interim coordinator until the new program is up and running. Over the next several months, Jim will be calling on you and your people for assistance with this important matter. I know that you will see to it that everyone is made aware of this important effort and will work diligently toward our goal. As railroaders, we all should be active participants in grade crossing safety—as we are in all aspects of safety.

/s/ D. R. Goode
D. R. GOODE

Attachment

cy: J. B. McCloskey

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

AFFIDAVIT OF T.H. SELLERS

STATE OF NORTH CAROLINA:

COUNTY OF WAKE:

I, T.H. Sellers, after first being duly sworn, do hereby state that I am over the age of eighteen (18) years and that I have personal knowledge of the facts contained herein.

1. At the time of the making of the two (2) documents which are attached hereto as Exhibits "A" and "B" to my affidavit, I was employed by the federal government as Highway (Area) Engineer with the majority of my duties being focused on highway matters.

2. Any inspection of the crossings was being done to bring these 196 crossings up to minimum standards.

3. Our function was not to act as a diagnostic team, there was no railroad participation in any inspection and no engineering decision by the federal government was being made.

4. The federal government relied on the Tennessee Department of Transportation as having the ultimate decision-making authority as to what type of protection would be installed at the crossings.

5. Our method of inspection was to look at a representative number of crossings in the group and if we

found problems with the way in which the work had been performed by the contractors, we would then look at additional crossings. Our goal was to see if the work had been done properly before the federal funds could be released after the fact to pay the contractors.

6. There are no records kept indicating which of the 196 crossings were checked for proper workmanship. In the two working days, site inspections of all 196 over 11 counties would not be possible.

7. We were approving the funding based on the State of Tennessee's decision. We were not making a federal decision as to the adequacy or sufficiency of the protection being installed at the crossings.

Further affiant saith not.

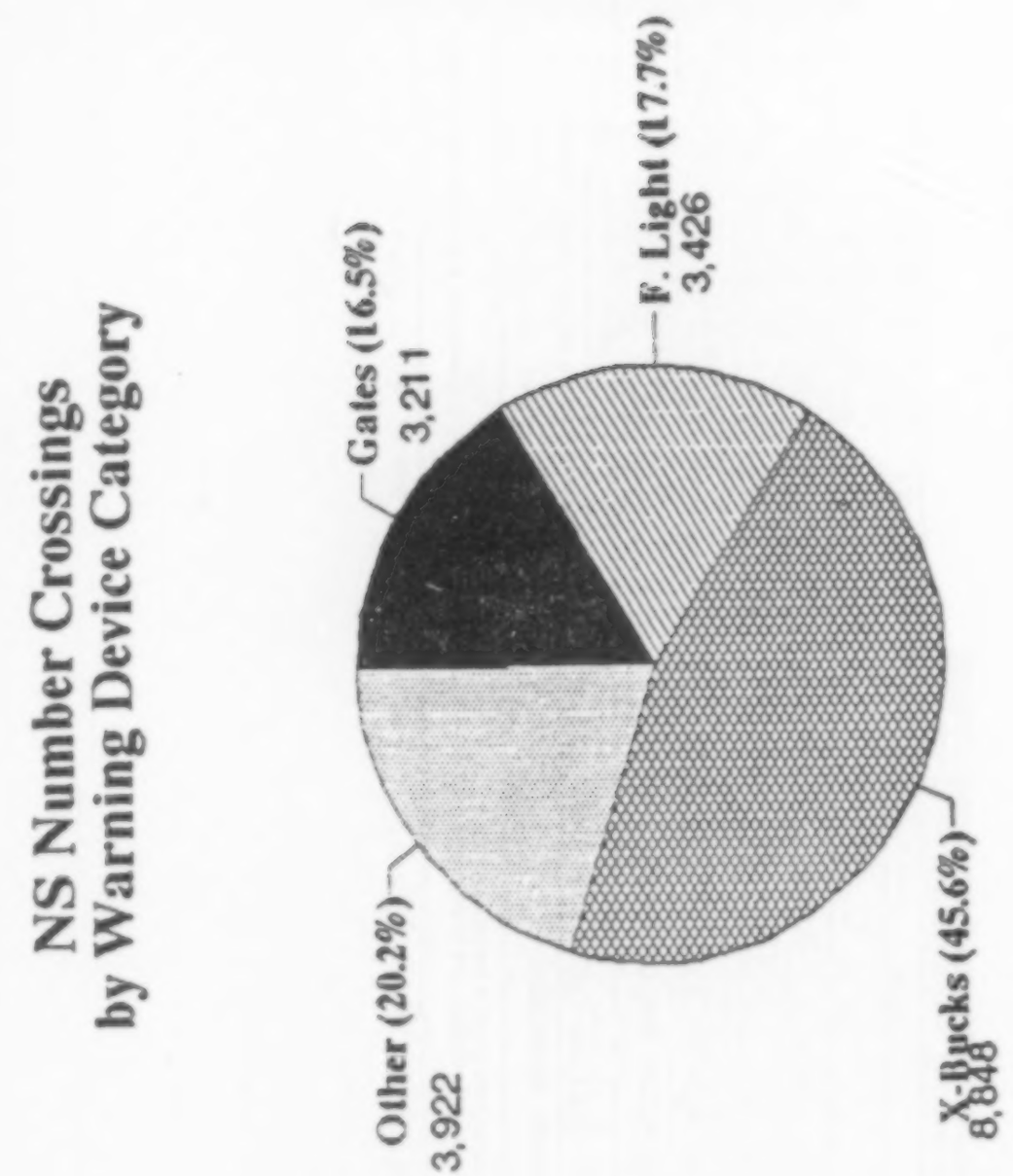
/s/ T.H. Sellers
T.H. SELLERS

[Notary Seal]

Sworn to and subscribed before me this the 17 day of Nov., 1995.

/s/ Martha Madden
Notary Public

My Commission Expires: 9/19/98



TO BE COMPLETED BY FHWA	U.S. Department of Transportation — Federal Highway Administration — FEDERAL-AID PROJECT AGREEMENT — 98040-3454-94	STATE TENNESSEE
		COUNTY Regionwide
		PROJECT NO. RRD-0008 (347)

The State, through its Highway Agency, having complied, or hereby agreeing to comply, with the applicable terms and conditions set forth in (1) Title 23, U.S. Code, Highways, (2) the Regulations issued pursuant thereto and, (3) the policies and procedures promulgated by the Federal Highway Administrator relative to the above designated project, and the Federal Highway Administration having authorized certain work to proceed as evidenced by the date entered opposite the specific item of work, Federal funds are obligated for the project not to exceed the amount shown herein, the balance of the estimated total cost being an obligation of the State. Such obligation of Federal funds extends only to project costs incurred by the State after the Federal Highway Administration authorization to proceed with the project involving such costs.

74-1233 (4-4-87)

PROJECT TERMINI

196 Off-System R/R Crossings in Chester, Crockett, Fayette, Gibson, Hardeman, Hardin, Haywood, Lauderdale, McNairy, Tipton, and Weakley Counties.

PROJECT CLASSIFICATION OR PHASE OF WORK	EFFECTIVE DATE OF AUTHORIZATION	APPROXIMATE LENGTH (Miles)
HIGHWAY PLANNING AND RESEARCH (HP & R)		
PRELIMINARY ENGINEERING		
RIGHTS-OF-WAY		
CONSTRUCTION	4-2-87	0.0

OTHER (Specify)

Low Bid	116,317.00	117,134.00
E & C 10%	11,832.00	11,714.00
Total	130,149.00	128,848.00

CONTRACT NO. 6533 WITH C & D Safety Company, Incorporated FOR CONSTRUCTION.

FUNDS

ESTIMATED TOTAL COST OF PROJECT	FEDERAL FUNDS
$ 130,149.00	$ 128,848.00

The State further stipulates that as a condition to payment of the Federal funds obligated, it accepts and will comply with the applicable provisions set forth on the following pages.

TENNESSEE DEPARTMENT OF TRANSPORTATION
(Official name of Highway Agency)

By _____

ACTING FOR THE COMMISSIONER

(Title)

By _____

(Title)

By _____

(Title)

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

By _____
(Division Administrator)

Date executed by Division Administrator: JUN 12 1987

FORM PR-2 (REV. 1-84) PREVIOUS EDITIONS ARE OBSOLETE

AGREEMENT PROVISIONS

1. RESPONSIBILITY FOR WORK.
a. Except for projects constructed under Certification Acceptance procedures, the State highway agency will perform the work, or cause it to be performed, in compliance with the approved plans and specifications or project proposal which, by reference, are made a part hereof.
b. With regard to projects performed under Certification Acceptance procedures, the State highway agency will perform the work, or cause it to be performed, in accordance with the terms of its approved Certification, or exceptions thereto as may have been approved by the Federal Highway Administration.

2. HIGHWAY PLANNING AND RESEARCH (HP&R) PROJECT. The State highway agency will (a) conduct or cause to be conducted, under its direct control, engineering and economic investigations of projects for future construction, together with highway research necessary in connection therewith, pursuant to the work program approved by the Federal Highway Administration and (b) prepare reports suitable for publication of the result of such investigations and research, but no report will be published without the prior approval of the Federal Highway Administration.

3. PROJECT FOR ACQUISITION OF RIGHTS-OF-WAY. In the event that actual construction of a road on this right-of-way is not undertaken by the close of the tenth fiscal year following the fiscal year in which this agreement is executed, the State highway agency will repay to the Federal Highway Administration the sum or sums of Federal funds paid to the highway agency under the terms of this agreement.

4. PRELIMINARY ENGINEERING PROJECTS. In the event that right-of-way acquisition for, or actual construction of the road for which this preliminary engineering is undertaken is not started by the close of the fifth fiscal year following the fiscal year in which this agreement is executed, the State highway agency will repay to the Federal Highway Administration the sum or sums of Federal funds paid to the highway agency under the terms of this agreement.

5. INTERSTATE SYSTEM PROJECT.
a. The State highway agency will not add or permit to be added, without the prior approval of the Federal Highway Administration any points of access to, or exit from, the project in addition to those approved in the plans and specifications for the project.
b. The State highway agency will not permit automotive service stations, or other commercial establishments for serving motor vehicle users, to be constructed or located on the right-of-way of the interstate system.
c. The State highway agency will not after June 30, 1968, permit the construction of any portion of the Interstate Route on which this project is located, including spurs and loops, as a toll road without the written concurrence of the Secretary of Transportation or his officially designated representative. The term 'toll road' does not include toll bridges or toll tunnels.

6. PROJECT FOR CONSTRUCTION IN ADVANCE OF APPORTIONMENT.
a. This project authorized pursuant to 23 U.S.C. 115 as amended, will be subject to all procedures and requirements, and conform to the standards applicable to projects on the system on which located, financed with the aid of Federal funds.
b. No present or immediate obligation of Federal funds is created by this agreement, its purpose and intent being to provide that, upon application by the State highway agency, and approval thereof by the Federal Highway Administration, any Federal-aid funds of the class designated by the project number prefix, apportioned or allocated to the State under 23 U.S.C. 103(e)(4), 104, or 144 subsequent to the date of this agreement, may be used to reimburse the State for the Federal share of the cost of work done on the project.

7. STAGE CONSTRUCTION. The State highway agency agrees that all stages of construction necessary to provide the initially planned complete facility, within the limits of this project, will conform to at least the minimum values set by approved AASHTO design standards applicable to this class of highways, even though such additional work is financed without Federal-aid participation.

8. BOND ISSUE PROJECT. Construction, inspection and maintenance of the project will be accomplished in the same manner as for regular Federal-aid projects. No present or immediate obligation is created by this Agreement against Federal funds, its purpose and intent being to provide aid to the State, as authorized by 23 U.S.C. 122, for retiring maturities of the principal indebtedness of the bonds referred to below. When the State requests Federal reimbursement to aid in the retirement of such bonds, the request will be supported by the appropriate certification required by 23 CFR Part 140, Subpart F, and Volume 1, Chapter 4, Section 8 of the Federal-Aid Highway Program Manual, and payment of the authorized Federal share will be made from appropriate funds available. If in any year there is no obligated balance of any apportioned Federal funds available from which payments hereunder may be made, there will be no obligation on the part of the Federal Government on account of bond maturities for that year. Funds available to the highway agency for this project are the proceeds of bonds issued by the governmental unit indicated on the attached tabulation, pursuant to the authority and in the amounts by date of issue and beginning date of maturities set forth therein.

9. SPECIAL HIGHWAY PLANNING AND RESEARCH PROJECT. The State highway agency hereby authorizes the Federal Highway Administration to charge the State's pro rata share of costs incurred against funds apportioned to the State under 23 U.S.C. 307 (c), as amended. In the event a project is financed with both Federal-aid funds and State matching funds, the State agrees to advance to The Federal Highway Administration the State matching funds for its share of the estimated cost. For a National Pooled Fund study, the State hereby assigns its responsibility for the work to the Federal Highway Administration. For an Intra-Regional Cooperative Study, the State hereby assigns its responsibility for the work to the lead State for the study.

10. PARKING REGULATION AND TRAFFIC CONTROL. The State highway agency will not permit any changes to be made in the provisions for parking regulations and traffic control as contained in the agreement between the State and the local unit of Government referred to in the paragraph on "Additional Provisions," without the prior approval of the Federal Highway Administration, unless the State determines, and the Division Administrator concurs, that the local unit of Government has a functioning traffic engineering unit with the demonstrated ability to apply and maintain sound traffic operations and control.

AGREEMENT PROVISIONS (Continued)

11. SIGNING AND MARKING. The State highway agency will not install, or permit to be installed, any signs, signals, or markings not in conformance with the standards approved by the Federal Highway Administrator pursuant to 23 U.S.C. 109(d) or the State's Certificate as applicable.

12. MAINTENANCE. The State highway agency will maintain, or by formal agreement with appropriate officials of a county or municipal government cause to be maintained, the project covered by this agreement.

13. LIQUIDATED DAMAGES. The State highway agency agrees that on Federal-aid highway construction projects not under Certification Acceptance the provisions of 23 CFR Part 630, Subpart C and Volume 6, Chapter 3, Section 1 of the Federal-Aid Highway Program Manual, as supplemented, relative to the basis of Federal participation in the project cost shall be applicable in the event the contractor fails to complete the contract within the contract time.

14. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT (APPLICABLE TO CONTRACTS AND SUBCONTRACTS WHICH EXCEED $100,000).

a. The State highway agency stipulates that any facility to be utilized in performance under or to benefit from this agreement is not listed on the Environmental Protection Agency (EPA) List of Violating Facilities issued pursuant to the requirements of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended.

b. The State highway agency agrees to comply with all of the requirements of section 114 of the Clean Air Act and section 308 of the Federal Water Pollution Control Act, and all regulations and guidelines issued thereunder.

c. The State highway agency stipulates that as a condition of Federal aid pursuant to this agreement it shall notify the Federal Highway Administration of the receipt of any advice indicating that a facility to be utilized in performance under or to benefit from this agreement is under consideration to be listed on the EPA List of Violating Facilities.

d. The State highway department agrees that it will include or cause to be included in any Federal-aid to highways agreement with a political subdivision of the State which exceeds $100,000 the criteria and requirements in these subparagraphs a. through d.

15. EQUAL OPPORTUNITY. The State highway agency hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the rules and regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance or guarantee, the following equal opportunity clause:

"During the performance of this contract, the contractor agrees as follows:

a. The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoffs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the State highway agency setting forth the provisions of this nondiscrimination clause.

b. The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

c. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the State highway agency advising the said labor union or workers' representative of the contractor's commitments under Section 202 of the Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

d. The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

e. The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records and accounts by the Federal Highway Administration and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

f. In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or Federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

g. The contractor will include the provisions of Section 202 of Executive Order 11246 of September 24, 1965, in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the State highway agency or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance; *Provided, however,* that in the event a contractor becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction by the Administration, the contractor may request the United States to enter in such litigation to protect the interests of the United States."

The State highway agency further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, that if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

AGREEMENT PROVISIONS (Continued)

The State highway agency also agrees:
(1) To assist and cooperate actively with the Federal Highway Administration and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor.
(2) To furnish the Federal Highway Administration and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the Federal Highway Administration in the discharge of its primary responsibility for securing compliance.
(3) To refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order.
(4) To carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the Federal Highway Administration or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order.
In addition, the State highway agency agrees that if it fails or refuses to comply with these undertakings, the Federal Highway Administration may take any or all of the following actions:
(a) Cancel, terminate, or suspend this agreement in whole or in part;
(b) Refrain from extending any further assistance to the State highway agency under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from the State highway agency; and
(c) Refer the case to the Department of Justice for appropriate legal proceedings.

16. NONDISCRIMINATION. The State highway agency (SHA) hereby agrees that it will comply with Title VI of the 1964 Civil Rights Act and related statutes and implementing regulations to the end that no person shall on the grounds of race, color, national origin, handicap, age, sex, or religion be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the project covered by this agreement and, further, the SHA agrees that:
a. It will insert the nondiscrimination notice required by the Standard Department of Transportation (DOT) Title VI Assurance (DOT Order 1050.2) in all solicitations for bids for work or material, and, in adapted form, in all proposals for negotiated agreements.
b. It will insert the clauses in Appendixes A, B, or C of DOT Order 1050.2, as appropriate, in all contracts, deeds transferring real property, structures, or improvements thereon or interest therein (as a covenant running with the land) and in future deeds, leases, permits, licenses, and similar agreements, related to this project, entered into by the SHA with other parties.
c. It will comply with, and cooperate with, FHWA in ensuring compliance with the terms of the standard Title VI Assurance, the act and related statutes, and implementing regulations.

17. MINORITY BUSINESS ENTERPRISES (MBE's)
a. The State highway agency hereby agrees to the following statements and agrees that these statements shall be included in all subsequent agreements between the recipient and any subrecipient and in all subsequent DOT-assisted contracts between recipients or subrecipients and any contractor:
(1) "Policy. It is the policy of the Department of Transportation that minority business enterprises (MBE's), as they are defined in 49 CFR Part 23 [for the purposes of 49 CFR Part 23, Subpart D, MBE's refer to disadvantaged business enterprises (DBE's); for the purposes of other subparts of Part 23, MBE's include women's business enterprises (WBE's)], shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently, all applicable requirements of 49 CFR Part 23 apply to this agreement.
(2) "Obligation. The recipient or its contractor agrees to ensure that MBE's, as defined in 49 CFR Part 23, have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard, all recipients or contractors shall take all necessary and reasonable steps in accordance with the applicable section of 49 CFR Part 23 to ensure that MBE's have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, handicap, religion, age, or sex, as provided in Federal and State law, in the award and performance of DOT-assisted contracts."
b. If, as a condition of assistance, the recipient has submitted and the Department has approved an MBE affirmative action program which the recipient agrees to carry out, this program is incorporated into this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the recipient of its failure to carry out the approved program, the Department shall impose such sanctions as are noted in 49 CFR Part 23, Subparts D or E, which sanctions may include termination of the agreement or other measures that may affect the ability of the recipient to obtain future DOT financial assistance.

18. BICYCLE TRANSPORTATION AND PEDESTRIAN WALKWAYS. No motorized vehicles shall be permitted on bikeways or walkways authorized under this project except for maintenance purposes and, when snow conditions and State or local regulations permit, snowmobiles.

19. MODIFIED OR TERMINATED HIGHWAY PROJECTS. For certain projects described in 23 CFR Part 480 or as prescribed in other parts of Title 23, Code of Federal Regulations, the payback provisions found in these parts shall supersede provisions 3 and 4 of this agreement.

20. ENVIRONMENTAL IMPACT MITIGATION FEATURES. The State highway agency shall ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental documents unless the State requests and receives written Federal Highway Administration approval to modify or delete such mitigation features.

CERTIFICATION ACCEPTANCE FINAL INSPECTION REPORT

81-0010

FHWA REGION	CITY	COUNTY	DIVISION
4	—	— Regional	Tennessee

IN COMPANY WITH	CONTRACT #
MR. S. BLUNT - TDOT	6523

DATE OF INSPECTION	INSPECTION MADE BY	PROJECT NO.
11/3/87 & 11/18/87	T.H. SELLERS	RAD-0005 (347)

WORK TYPE/LOCATION
SIGNS & PAVEMENT MARKINGS AT 196 OFF-SYSTEM RAILROAD CROSSINGS IN TDOT REGION 4

SATISFACTORY ☑ UNSATISFACTORY ☐

By copy of this report it is requested that Form FHWA-1446C be submitted for our completion so the project can be closed.

AREA ENGINEER

Eff. date 2/3/87 F-INSPEC Disk#1 J/Permanent

PROGRAMMING DIVISION - FEDERAL-AID LIAISON

FEDERAL-AID PROJECT RECORD

F.A. PROJECT NO. RRO-000S(347) 5-330 STATE PROJECT NO. 98040-3654-94 ✓

ITEM NUMBER CP-236

PROGRAM APPROVED 4-2-87 @ 99 % F.A. FUNDS

SUB. TO BPR PROJ. AUTHORIZED LENGTH 0.00

COUNTY Regionwide

TERMINI 196 Off-System R/R Crossings in Chester, Crockett, Fayette, Gibson, Hardin. ~~Hardeman, Haywood, Lauderdale, McNairy, Tipton, and Weakley Counties~~

TYPE OF WORK Installations of Minimum Protection

CONTRACTOR C & O Safety Company, Incorporated CONTRACT NUMBER 6533

LETTING DATE 5-1-87 WORK BEGAN 6-8-87 WORK FINISHED 11-18-87

		EXECUTED DATE	F.A., $	NON-F.A., $
PR-2,	$ 130,147.00 + 1,624.00	6-2-87	128,848.00 + 1,607.00	
PR-2A,	131,773.00	7-31-89	130,455.00	
"		"	"	"
"	-614.00	"	- 608.00	"
FINAL VOUCHER	131,159.00	"	129,847.00	PAID 12-11-89

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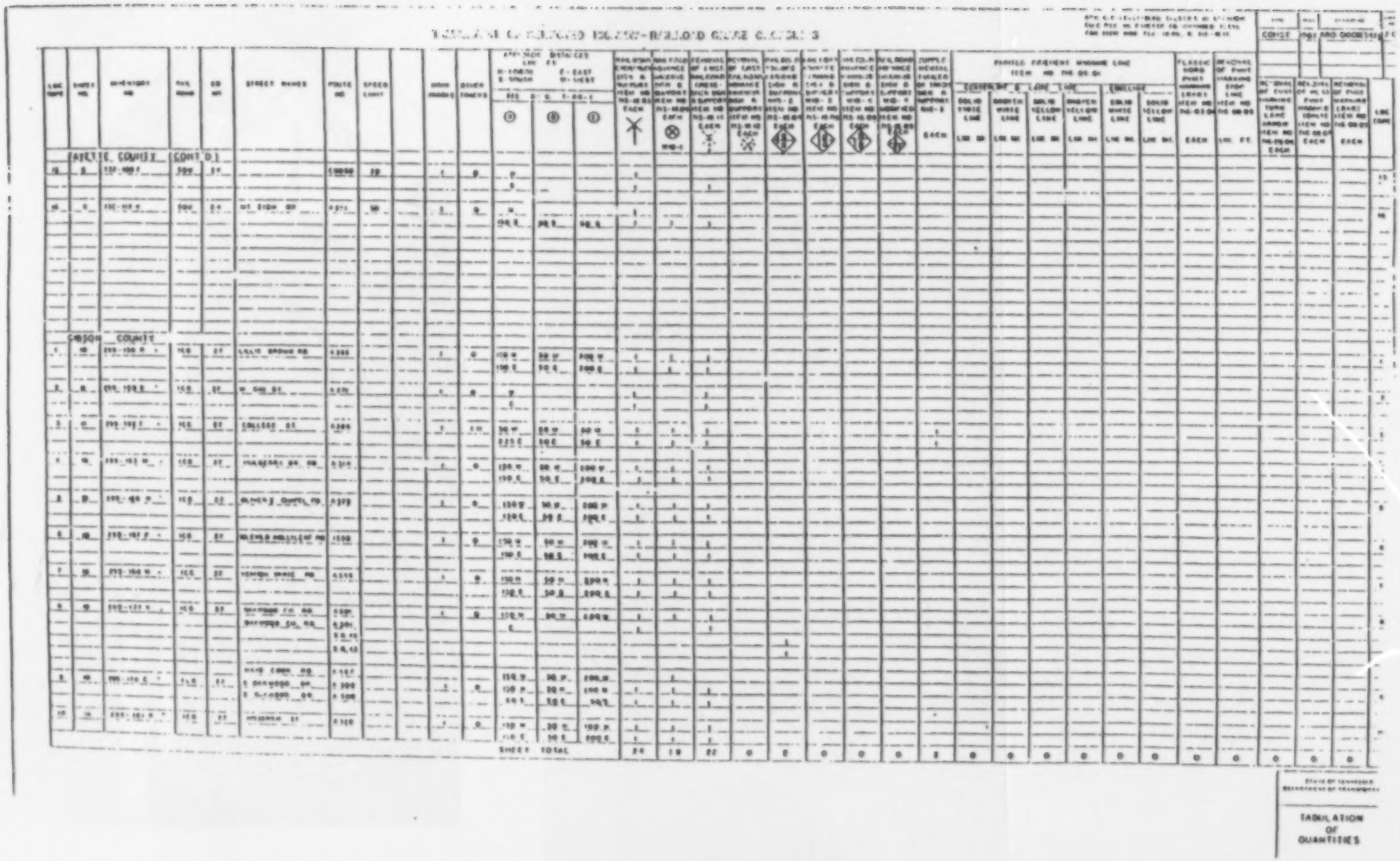
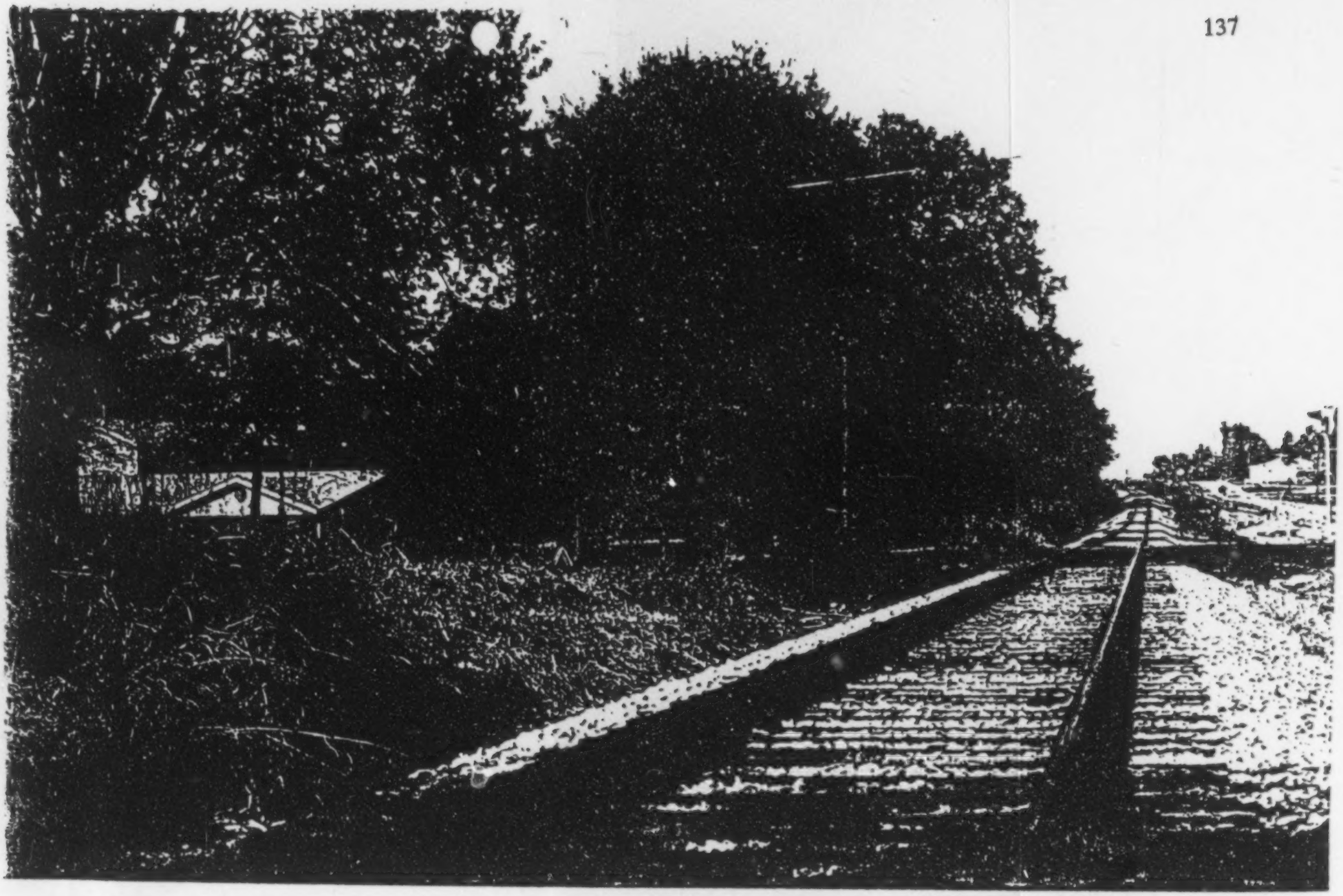


TABULATION OF QUANTITIES

RAIL ROAD
CROSSING



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

FINAL INSPECTION OF FEDERAL AID PROJECT
CONSTRUCTED UNDER 23 U.S.C. 117

#6533
84-1155

INSTRUCTIONS: State is to complete items 1, 2, 3, and submit original and three (3) copies to the Federal Highway Administration Division Office.

1. PROJECT NO.	2. COUNTY	3. STATE
RRO-0005 (347)	Regionwide	TENNESSEE

4. DESCRIPTION OF IMPROVEMENT AS PROGRAMED

196 Off-System Railroad Crossings in Chester, Crockett, Fayette, Gibson, Hardeman, Hardin, Haywood, Lauderdale, McNairy, Tipton and Weakley Counties.

Installation of Minimum Protection

5. CONTRACTOR'S NAME	6. CONTRACT AMOUNT
L & D Safety Company	$ 118,316.80

7. NOTICE OF COMPLETION: The above listed project has been completed and is ready for final inspection.

SIGNATURE (SHA OFFICIAL) Peter Falkenberg

TITLE Certification Acceptance Engineer

8. FEDERAL HIGHWAY ADMINISTRATION INSPECTION MADE BY	9. DATE OF INSPECTION
T.H. SELLERS	11/3/87 & 11/18/87

10. IN COMPANY WITH
MR. S. PERRY - TDOT

11. REMARKS

12. SIGNATURE	13. TITLE	14. DATE
	ADM ENG	4/25/88

Form FHWA-1446Q
(Rev. 2-78)

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BEST AVAILABLE COPY